152 US 222

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RECORD, CASE No. 14,131.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 169.

SILAS F. KING, APPELLANT AND PLAINTIFF IN ERROR,

vs.

THE AMY & SILVERSMITH CONSOLIDATED MINING COMPANY.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED SEPTEMBER 4, 1890.

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a ("Endorsed on cover.")

In the Supreme Court of the Territory of Montana, January, A. D. 1889, Term.

SILAS F. KING, Plaintiff & Appellant,
v.
THE AMY AND SILVERSMITH CONSOLIDATED MINING COMPANY, Defendant and Respondent.

Transcript on Appeal.

Appeal from the district court of the second judicial district in and for the county of Silver Bow.

Appearances: For appellant, E. W. Toole, Esquire, William Scallon, Esquire; for respondent, Knowles & Forbis, Esqs., W. W. Dixon, Esquire.

Filed this 8th day of July, A. D. 1889.

R. L. WORD, *Clerk.*

1 In the District Court of the Second Judicial District of the Territory of Montana in and for the County of Silver Bow.

SILAS F. KING, Plaintiff.
v.
THE AMY & SILVERSMITH CONSOLIDATED MINING COMPANY and JOHN HIGGINS, Defendants.

Complaint.

The plaintiff complains and for cause of action in equity shows to the court—

That he has an estate of inheritance in fee to the extent of three undivided fourth parts thereof in the following-described premises, situated in the county of Silver Bow, in the Territory of Montana, to wit, of the quartz lode mining claim known as the "Non-consolidated," in the Summit Valley mining district, in township 3 north, of range 8 west, of the principal meridian, and bounded as follows, to wit: Beginning at the southwest corner thereof, from which the corner to sections 1, 2, 11, and 12, in said township, bears north 81 degrees 12 minutes west, 1,120 feet distant, running thence north 66 degrees 30 minutes east 411 feet; thence north 1 degree 40 minutes east 10 feet; thence north 88 degrees 55 minutes west 372 feet; thence south 1 degree 40 minutes west 181 feet to the place of beginning, officially designated in the United States Land
2 Office as lot No. 466, and the veins, minerals, ores, and metals therein, and particularly those portions of that vein and ledge situated within the vertical planes of the southern boundary of said claim and its other boundaries, which is now opened and developed by shafts and underground workings and

which passes in its onward course and strike from and out of an adjoining claim known as the "Amy" and official lot No. 246, through the latter's northerly boundary line and its vertical plane (or northwesterly boundary line and plane, as it may also be called), into the said "Non-consolidated" claim and through the latter to its western boundary, as plaintiff alleges on information and belief, and that plaintiff is now in possession thereof.

That the defendant The Amy & Silversmith Consolidated Mining Company is a corporation organized and existing under and by virtue of the laws of the Territory of Montana, and that said defendant has an estate of inheritance in fee to the extent of one undivided fourth part of said premises and is in possession of said interest.

That there are no liens or incumbrances thereon appearing of record, and that no person other than the plaintiff and the said company defendant are interested in said premises as owner or otherwise, save and except the defendant John Higgins, who has a lease for the same for one year from the 20th day of February, 1887, from the said plaintiff and company defendant, and that plaintiff is desirous that partition should be made, subject to and without interfering with said lease, on account of which, and that only, said Higgins is hereto made a party.

3 That the ownership and possession of said premises in common is productive of great inconvenience to the parties, and particularly to the plaintiff.

That a partition of said claim by an apportionment of distinct parcels thereof cannot be made without great prejudice to the owners.

And for a further cause of action incidental to the foregoing the plaintiff shows to the court—

That on the 7th day of October, 1886, the plaintiff was and ever since has been and now is the owner of three undivided fourth parts of the premises described as follows, to wit:

The lode mining claim known as the "Non-consolidated," situated in the Summit Valley mining district, in the county of Silver Bow, Territory of Montana, in township 3 north, of range 8 west, bounded as follows: Beginning at the southwest corner, from which the corner to sections 1, 2, 11, and 12, in said township, bears north 81 degrees 12 minutes west, 1,120 feet distant, running thence north 66 degrees 30 minutes east 411 feet; thence north 1 degree 40 minutes east 10 feet; thence north 88 degrees 55 minutes west 372 feet; thence south 1 degree 40 minutes west 181 feet to the place of beginning, officially designated as lot No. 466, and the veins and ledges, minerals, ores, and metals therein contained, and those certain portions of that vein or ledge situated therein which is now opened and developed by workings from the surface and underground and which passes in its onward course and strike from and out of an adjoining claim known as the "Amy," official lot

4 No. 246, through the latter's northerly (or northwesterly, as it may also be called) boundary line in its vertical plane into the said "Non-consolidated" claim, and through the latter to its

westerly boundary, and that said premises are the same as those described in the above-set-forth and foregoing cause of action.

That on the said 7th day of October, 1886, the said defendant, The Amy & Silversmith Consolidated Mining Company, became and ever since has been and still is the owner in fee of an undivided one-fourth part of the above-described premises and property and tenants in common thereof with the plaintiff.

That said defendant is a corporation existing under and by virtue of the laws of Montana Territory.

That thereupon, to wit, at the said date and time, the said defendant assumed to act as manager, in the owner's right, over said property, as plaintiff is informed and believes, and that from the said day up to the — day of January or February, 1887, the said defendant received on the account of said common property large sums of money which belonged to all the tenants in common, viz., to said plaintiff and said company defendant, and fraudulently retained and still retains the whole of said moneys.

That the said company defendant, as plaintiff alleges on information and belief, has also in the same manner, during the said period, received the issues, rents, and profits of the said common property and fraudulently retained and still retains more than its share of the same, to wit, the whole thereof.

5 That, furthermore, the said company defendant took away large quantities of the said common property, to wit, of the minerals contained therein and of the ores, metals, and minerals contained in the above-described vein in those portions thereof situated within the boundaries of said claim after passing beyond the said boundary line of said "Amy" claim on its (the said vein's) onward strike, and appropriated the whole of the said common property, ores, and minerals exclusively to itself without plaintiff's consent, and that said defendant thereby greatly lessened in value and injured and abused said common property.

And plaintiff further shows and alleges that the amount and value of the moneys, rents, issues, and profits so received and retained by the said company defendant and the quantity and value of the property so taken away by the said defendant is unknown, and that the plaintiff has no means of ascertaining the same except by an accounting by said defendant, as herein prayed for and the aid of this court.

That the plaintiff is willing and hereby offers to allow a rebate for and deduction of all proper charges and expenses and to assume his share thereof; that he has requested an accounting from defendant, who promised to account, but now declines.

Wherefore plaintiff prays for a decree of this honorable court to the effect following, to wit:

First. For a partition of the above-described premises ac-
6 cording to the respective rights of the persons interested therein and for a sale of such property in case a partition cannot be had without great prejudice to the owners and a division of the proceeds according to the respective rights of the parties, and

that such partition and sale be made without interfering with the lease of said Higgins.

Second. That the said defendant, The Amy & Silversmith Consolidated Mining Company, render a fair and just account to the plaintiff.

Third. That the plaintiff recover any balance found due to him, if any, on said accounting after deducting said proper charges and expenses, and that the partition or sale and distribution of proceeds prayed for be made in such a manner as to compensate the plaintiff therefor.

Fourth. And plaintiff further prays that, in aid of the preceding, the defendant make, in such manner as the court shall order, full discovery in the premises.

Fifth. And, finally, prays for such other relief as to the court may seem meet.

Sixth. For costs.

(Sig.) WM. SCALLON,
Plaintiff's Attorney.

(Duly verified.)

Endorsed: Filed July 1st, '87. (Sig.) Wm. F. Shanley, clerk, by C. V. Henderson, deputy clerk.

7 *Answer.*

Title of Court and Cause.

Now comes the above-named defendant, Amy and Silversmith Consolidated Mining Company, and, for answer to the complaint of the plaintiff herein on file, denies that the plaintiff has an estate of inheritance in fee or any other estate of three undivided fourths or any other interest in or to those portions of that certain ledge situated within the vertical plane of the southern boundary of the said "Non-consolidated" Lode claim and its other boundaries which is now opened and developed by shafts and underground workings and which passes in its onward course and strike from and out of the "Amy" claim through the northerly boundary line and vertical plane of said "Amy" claim into the said "Non-consolidated" claim.

Defendant alleges the facts to be that the said vein or ledge described in plaintiff's complaint and claimed as belonging to the said "Non-consolidated" Lode claim, and which has been explored and developed as in plaintiff's complaint alleged (and so far as the same has been so explored and developed), has its apex or top within the limits and boundaries of the said "Amy" Lode claim, and is a part and parcel of the said "Amy" claim which this defendant owns and is entitled to possess exclusively, and the plaintiff has no right to or claim upon the said vein, although the

8 said vein may so far depart from a perpendicular in its downward course as to enter the ground of the said "Non-consolidated" Lode claim in its dip or downward course.

And, further answering to the alleged second cause of action set up in plaintiff's complaint, defendant denies that on the 7th day of October, 1886, or at any other time plaintiff was or has at any time since been the owner of three undivided fourths part or any other part or interest in or to that certain vein or ledge situated in the said "Non-consolidated" Lode claim which is now opened and developed by workings from the surface and underground and which passes in its onward course and strike from and out of the "Amy" claim through its northerly or northwesterly boundary line and its vertical plane into the said "Non-consolidated" claim.

But defendant alleges the facts to be that the said vein or ledge described in plaintiff's complaint and claimed as belonging to the said "Non-consolidated" Lode claim and which has been explored and developed as in plaintiff's complaint alleged (and to the extent so explored and developed) has its apex or top within the limits and boundaries of the said "Amy" claim and is a part and parcel of the said "Amy" Lode claim, which claim this defendant owns and is entitled to possess exclusively, and the plaintiff has no title thereto or right to the said vein, although the said vein may so far depart from a perpendicular course in its downward bearing or dip as to depart from the vertical side line of the "Amy" claim and enter the ground claimed as the "Non-consolidated" claim in its downward course or dip.

Denies that on or about the 7th day of October, 1886, or at any other time or at all, this defendant assumed to act as manager or otherwise, in the owners' right, over the said "Non-consolidated" claim or any part or portion thereof, or that, at any time whatever, the defendant received, on account of the said "Non-consolidated" claim, large or any sums of money at all which belonged to the plaintiff and this defendant or in which plaintiff has or had any right or interest as tenant in common with this defendant or otherwise, or that this defendant, fraudulently or otherwise, retains any money whatever belonging to the plaintiff or that plaintiff has any right whatever to any money received by this defendant.

Denies that this defendant has, in any manner or during any time, received the issues, rents, or profits of the said "Non-consolidated" claim or any part thereof, or that it fraudulently or otherwise retains more than its share of the same, or that it retains any issues, rents, or profits belonging to the said common property.

Denies that this defendant has ever at any time taken away large or any quantities of the said common property or of the minerals therein contained, or of the ores, metals, or minerals contained in the said vein described in plaintiff's complaint, in those portions thereof situated within the boundaries of the said "Non-consolidated" claim, after passing beyond the boundary line of the "Amy" claim, on the onward strike of the said vein, or that it ever at any time appropriated the whole or any part of the said common property, ores, or minerals exclusively or at all to itself, or that defendant thereby greatly or at all lessened in value or injured or abused said common property.

Denies that this defendant ever promised or now refuses to ac-

count to plaintiff for any and all ores and mineral extracted from the said "Non-consolidated" Lode claim; but avers that there is nothing in the hands of this defendant to account to plaintiff for, and that defendant has never at any time received any of the common property or proceeds therefrom, and therefore ought not to be held to any account to the said plaintiff.

Defendant, having fully answered, asks to be dismissed hence with costs of suit.

(Sig.) KNOWLES & FORBIS,
Attorneys for Defendant.

(Duly verified.)

Endorsed: Filed Aug. 3, '87. Wm. F. Shanley, clerk, by (Sig.) C. V. Henderson, deputy clerk.

11 *Replication.*

Title of Court and Cause.

Now comes the plaintiff above named, and, replying to the first answer of the said company defendant, denies on information and belief that the vein or lode referred to in said answer has its apex or top within the limits or boundaries of the said "Amy" Lode claim or is a part or parcel of said claim, and further denies on information and belief that said vein enters the "Non-consolidated" claim — its dip or downward course, and avers on information and belief that it enters said ground on its onward course and strike, and that no part or portions of said vein lies or lie within vertical planes drawn down through the end lines, to wit, through either the nominal or real end lines of the said "Amy" claim continued in their own direction.

And, replying to said defendant's second answer, the plaintiff denies on information and belief that the vein or lode referred to in said answer has its apex or top within the limits or boundaries of the said "Amy" Lode claim or is a part or parcel of said claim or that it enters the "Non-consolidated" ground or claim on its dip or downward course or otherwise than on its onward course and strike, and avers on information and belief that no part or portions of said vein lies or lie within vertical planes drawn down through the end lines, to wit, through either the nominal or real end lines of the said "Amy" claim continued in their own direction.

12 (Sig.) WM. SCALLON,
Plaintiff's Attorney.

(Duly verified.)

Endorsed: Filed Aug. 5, '87. Wm. F. Shanley, clerk, by (Sig.) C. V. Henderson, deputy clerk.

13 *Findings of Fact.*

Title of Court and Cause.

First. That the respective parties are the owners in fee of the claims set out in the complaint and answer.

Second. That the west end line of the "Amy" claim as located and patented is four hundred and ninety-one (491) feet in length and runs south three (3) degrees east.

Third. That the east end line of the same as located and patented is four hundred and ninety-one (491) feet in length and parallel with the said west end line.

Fourth. That the north side line of the said claim as located and patented is one thousand four hundred and seventy feet in length (1,470) and runs south sixty-six (66) degrees thirty (30) minutes west.

Fifth. That the south side line thereof as located and patented is one thousand four hundred and seventy (1,470) feet in length and runs north sixty-six (66) degrees thirty (30) minutes east.

Sixth. That the vein of the said "Amy" mining claim, which is in controversy herein and which is the discovery vein of the "Amy" claim, in its onward course and strike passes beyond the north side line of said claim as located, and that the apex thereof in its onward course and strike passes through the same at a point one hundred and eighty-four feet (184) from the west end line thereof into the "Non-consolidated" mining claim, and that said vein in its
14 onward course and strike extends and runs on indefinitely in a northwesterly direction, and does not return into the said "Amy" mining claim.

Seventh. That said vein and its apex passes out of the south side line of the said "Amy" mining claim as located at some point between the southeast corner of said claim and a point six hundred (600) feet westerly therefrom.

Eighth. That the dip of said vein throughout is to the north.

Ninth. That four hundred and eleven (411) feet of the north line of the "Amy" mining claim, commencing at a point seventeen (17) feet east of its northwest corner, forms the south line of the "Non-consolidated" mining claim as patented.

Tenth. That the west end line of the "Non-consolidated" mining claim is one hundred and eighty-one (181) feet in length and runs south one (1) degree forty (40) minutes west.

Eleventh. That the north side line of the said "Non-consolidated" mining claim is three hundred and seventy-two (372) feet in length and runs north eighty-eight (88) degrees fifty-five (55) minutes west.

Twelfth. That the east end line of the said "Non-consolidated" mining claim is ten (10) feet in length and parallel to the said west end line thereof as patented.

Thirteenth. That the decision of the court (subject to the right of review on appeal) as to whether a vertical plane drawn downward along the boundary line of the said "Amy" and the said "Non-

consolidated " mining claims or a vertical plane drawn down-
15 ward on a line parallel with the west end line of the said "Amy" mining claim (where the apex thereof passes through said side line) or otherwise shall define the rights of the parties, and shall likewise determine the right to an accounting or the extent thereof, as the case may be.

Fourteenth. That both of said mining claims were located and entry made since the passage of the amendments of the mineral-land law in 1872 and subject thereto, and that the said "Amy" mining claim is the older location and held under the senior patent.

Fifteenth. That the said plaintiffs are the owners of three fourths of the said "Non-consolidated" mining claim, and the defendant is the owner of one-fourth of the same; that the same cannot be divided without great prejudice to the parties in interest; that there are no liens or encumbrances on the same or other persons interested therein, and that the evidence shows that in all respects a partition by sale of said premises should be had:

(Sig.) S. DE WOLFE, *Judge*.

Endorsed: Filed Dec. 29th, 1888. (Sig.) Frank E. Corbett, clerk.

16 *Opinion of Judge.*

Title of Court and Cause.

This is an action brought by the plaintiff against the Amy & Silversmith Mining Co. for partition of the mining claim and premises called the "Non-consolidated" mining claim, and for an accounting for the issues and profits of ores and minerals alleged by plaintiff to have been extracted by the defendant from said mining claim and appropriated by it to its own use.

The complaint alleges that the plaintiff is the owner in fee of three-fourths undivided interest in the "Non-consolidated" mining claim, and that the defendant, Amy & Silversmith Mining Co., is the owner of the other one-fourth. This is admitted or not denied by the answer.

The parties to the action have likewise agreed on special findings of fact necessary for the determination of action, excepting only the fact whether the vein or lode on which the "Amy" mining claim was originally located on its strike or course passes through the south boundary line of the "Amy" claim, which divides it from the "Frank Moulton" mining claim, or whether said vein or lode passes out of the surface lines of the "Amy" claim, as located, through the east end line thereof.

Nearly all the evidence introduced by both parties was directed and intended to support one or the other of these theories. Much of the evidence was conflicting and much of it was theoretical or
17 conjectural, as the witnesses on both sides admitted that the vein on its strike or onward course had not been exposed or developed from the discovery shaft on the "Amy" to its point of exit from that claim.

In the view which I take of this matter and the law applicable thereto a finding of fact on this point is not indispensable or even necessary in determining the question at issue in this case, for whether the vein in question departs in its strike or onward course through the east end line of the "Amy" location or whether it leaves the location through its south side line and enters the "Frank Moulton" claim cannot, in the view which I take of the law, affect the question as to whether the plaintiff or defendant is entitled to the vein on its dip or downward course at the point in controversy.

By the seventh finding of fact, admitted by both parties to the action, the "Amy" discovery vein on its onward course and strike passes through the north side line of said claim as located, and the apex of the vein passes through the north side line at a point 184 feet from the west end line of the "Amy" and enters the "Non-consolidated" mine, and the question of law to be determined from this admitted fact is the right to follow the vein on its dip or downward course beyond the north side line of the location or, accurately speaking, beyond vertical planes drawn downwards through the side line, which is the theory or construction of the law contended for by the plaintiff, while the defendant contends that a right construction of the law gives to them the apex of the vein to the extent to which it is found within the "Amy" location on the surface, and lines drawn through the vein on its strike
18 or course at its intersection or point of departure from the side lines of the location, and thence extended in a direction parallel to the end lines of the location, defines that portion of the dip or downward course of the vein which defendant has the right to follow.

The question for determination is, which, if either, of these theories or constructions is correct?

Section 2322 of the Revised Statutes of the United States is the one now requiring construction and application to the facts as found and admitted in this case. That section, after stating some other rights acquired by the location of a lode claim, continues as follows:

(Locators) "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface locations, but their right of possession to such outside parts of such veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes, or ledges."

The statute, it will be perceived, evidently contemplates that locations upon mineral veins or ledges will be made along and in

the direction of the strike or course of the vein, and only
19 provides for following the vein in its dip or downward course when it passes underneath the side lines of the claim as located. It does not mention veins or ledges which cross the surface ground at right or any lesser angle, and define in express terms the rights of the locator on veins thus crossing the surface location, and in their course or strike departing through the side lines, but, as seen, it does provide that the locator shall have the "exclusive right of possession of all such veins or lodes throughout their entire depth, the top or apex of which lies inside the surface lines of the location extended downward vertically."

Now, the apex of the vein in question does lie within the surface lines of the "Amy" claim as located. From the point at which it leaves the surface location 184 feet east of the west end line of the "Amy" claim to some point on the south boundary line of the same claim (said point, as stated, not being clearly established by the evidence) — leaves the "Amy" location and enters the "Frank Moulton" lode.

If the vein is of uniform strike from the "Amy" discovery shaft to the point at which it leaves that location and enters the "Frank Moulton" claim; that it is shown — the evidence to be from the discovery shaft to the point at which it crosses the north side line of the "Amy" and enters the "Non-consolidated" claim, the length of the vein and of the apex in the "Amy" claim would, in round numbers, be 800 feet. The vein, by the concurrent testimony of all the witnesses, has a pitch to the north in its dip or downward course.

What, then, is the portion of this vein which defendants have the right to follow in the dip, it being conceded in the argument and the law itself being plain on the point that the defend-
20 ant has no right to follow the vein or strike or course after it departs or crosses the side lines of the location on the surface?

As the law gives the locator the apex within the surface location and the right to follow the vein on its dip or incline into the earth, is not the locator entitled to the same length along the vein on its dip that he has to the apex on the surface? And as the dip of a vein is supposed to be at right angles with its strike, lines drawn through the vein at right angles with its strike or course where the vein departs from the surface side lines of the claim and these lines extended laterally in the direction of the dip or pitch of the vein beneath the surface and vertical lines drawn downwards through these lines and intersecting the vein beneath the surface, defines, in my view, the dip of the vein and the portion thereof to which the defendant in the present case is entitled.

This right to follow the vein in its dip is of course limited by the provision of the section referred to as not permitting a locator to pass beyond planes drawn vertically downward through the end lines of the location and thence extended laterally so as to intersect the exterior parts of the vein or lode.

It is further believed that neither of the cases referred to by

counsel and decided by the Supreme Court of the United States, wherein it is stren-ously urged that a contrary doctrine has been held, asserts any principle or construction of the mining law contrary to that here maintained, but time is not at present granted to examine or reconcile or attempt — those decisions with the views here expressed.

21 Endorsed: Filed Dec. 29th, 1888. (Sig.) Frank E. Corbett, clerk.

22 Title of Court and Cause.

Judgment by the Court.

This cause having been regularly called for trial and tried by the court without a jury, the court, on this 29th day of December, 1888, upon the evidence in the case, the pleadings, and the stipulations and the admissions of the parties as to the correctness of all the facts stated in the findings (save and except the seventh finding of fact), made findings of fact and conclusions of law and a decision thereon in writing, which findings and decision are now on file in this cause, wherein it was found and adjudged the plaintiff is the owner in fee of three-fourths of the "Non-consolidated" mining claim, and that the defendant is the owner of one-fourth thereof; that the said claim is so situated that partition thereof can-ot be had without great prejudice to the owners, and that plaintiff is entitled to a decree for the sale thereof, and that there are no liens or encumbrances thereon or any rights of dower or any other rights whatever, at law or equity, in or to the same, save those of the plaintiff and defendant, and that of the vein in controversy in this case, to wit, of the vein known as the Amy discovery vein after it passes into the said "Non-consolidated" claim, all those portions lying and being west of a line drawn at right angles to the strike of the vein at the place where its apex enters the said "Non-consolidated" claim belong to the said "Non-consolidated" claim and all portions lying east of said line do not belong to said "Non-
23 consolidated" claim, but to another claim lying south of said "Non-consolidated" claim, to wit, the "Amy" claim, referred to in said findings and decision, and that the defendant herein as the owner of the said "Amy" claim is the owner of the said last-mentioned portions of said vein exclusively.

Now, therefore, it is hereby ordered, adjudged, and decreed that the said "Non-consolidated" claim, situated in the Summit Valley mining district, township three north, of range eight west, of the principal meridian of Montana, in Silver Bow county, Montana, and bounded as follows, to wit:

Beginning at the southwest corner thereof, from which the corners to sections one, two, eleven, and twelve, in said township, bears north 81 degrees and 12 minutes west, one thousand one hundred and twenty (1,120) feet distant, and running thence north 66 degrees and 30 minutes east four hundred and eleven (411) feet; thence north 1 degree and 40 minutes east ten (10) feet; thence

north 88 degrees and 58 minutes west three hundred and seventy-two (372) feet; thence south 1 degree and 40 minutes west one hundred and eighty-one (181) feet to the place of beginning; and officially designated in the United States Land Office as lot number four hundred and sixty-six (466), including all those portions of that certain vein called the Amy discovery vein which runs into the said "Non-consolidated" claim from the Amy claim, which last-mentioned claim is designated in the United States Land Office as lot number two hundred and forty-six (246), lying west of a vertical plane drawn downward through a line drawn at right
24 angles to the strike of the said Amy discovery vein, at the point where its apex enters the said "Non-consolidated" claim, to wit, at a point on the south boundary line of the said "Non-consolidated" claim, from which the northwest corner of the said "Amy" claim, as surveyed, bears south 66 degrees and 30 minutes west one hundred and eighty-four (184) feet distant, said line having the bearing of north 12 degrees and 30 minutes east and extending indefinitely in its own direction, but exclusive of all portions of the same vein lying east of the said line; which said last-mentioned portions of said vein are hereby declared to belong exclusively to the defendant as the owner of the said "Amy" claim and to form no part of the said "Non-consolidated" claim—

Be sold at public auction to the highest bidder, upon notice in the manner required for the sale of real property on execution, and for cash, by and under direction of the sheriff of Silver Bow county, who is hereby appointed referee to conduct the said sale, and that any of the parties to this may become the purchaser or purchasers thereof; that the said referee forthwith, after said sale, make a report thereof to this court, and that after his report of sale shall have been duly confirmed and the judgment of this court entered, he then execute a deed of the said premises to the purchaser or purchasers at said sale, upon their complying with the conditions under which the deed is to be delivered, and that such sale and conveyance be valid and effectual forever.

And it is further ordered and adjudged that the costs of
25 the parties to this action, to be taxed, be paid out of the proceeds of the sale thereof, the same to be paid to the respective attorneys of the parties, and that said referee, in like manner, retain out of the proceeds of the sale the fees, commissions, and disbursements to which he is entitled on such sale.

And it is further ordered and adjudged that said referee pay to Silas F. King, the plaintiff in this action, three-fourths of the residue of the net proceeds of the sale of the said premises and the other one-fourth to the above-named defendant, and that the referee take receipt for such payments and file them with his report to be made of his proceedings subsequent to the confirmation of his report of sale.

And it is further ordered and adjudged that such title, deeds, and writings as may be in the possession or under the control of any or either of the parties as appears to relate solely to said premises so ordered to be sold be delivered up to the purchaser thereof.

And it is further ordered and adjudged that the purchaser or purchasers of the said premises be put into possession thereof, and that any of the parties to this action who may be in possession of the said premises or any part thereof, or that any person who since the commencement of this action may have come into possession of them or any part thereof, deliver the possession thereof to such purchaser or purchasers on the production of the referee's deed for said premises.

And it is further ordered and adjudged that the said
26 referee make a report of his proceedings under this order subsequent to the confirmation of his report of sale to be made as above directed.

And it is further ordered and adjudged, in accordance with the agreement and stipulation of the parties hereto to that effect, that the court reserve jurisdiction of this case in so far as the demand for an accounting is concerned, for the purpose of making such order concerning the same as may be proper.

Made in open court this 29th day of December, 1888.

(Sig.) S. DE WOLFE, *Judge*.

Endorsed: Filed December 29th, 1888. (Sig.) Frank E. Corbett, clerk.

27 *Notice of Appeal.*

Title of Court and Cause.

Please take notice that the plaintiff in the above-entitled action hereby appeals to the supreme court of the Territory of Montana from the order and judgment made, entered, and filed in the above-entitled action on the 29th day of December, 1888, and from the whole thereof.

(Sig.) E. W. TOOLE & WM. SCALLON,
Att'ys for Pl'ff & App't.

To Messrs. Knowles & Forbis and W. W. Dixon, att'ys for defendant.

Service of above notice acknowledged after filing and copy waived this 21st day of January, 1889.

(Sig.) KNOWLES AND FORBIS,
Of Counsel for Df't.

Endorsed: Filed Jan. 21st, 1889. (Sig.) Frank E. Corbett, clerk.

28 *Undertaking on Appeal.*

Title of Court and Cause.

Whereas the plaintiff in the above-entitled action is about to appeal to the supreme court of the Territory of Montana from the order and judgment made, filed, and entered in the above-entitled action on the 29th day of December, 1888:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, of the county of Silver Bow, Territory of Montana, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all costs and damages which may be awarded against him on the appeal or on a dismissal thereof not exceeding three hundred dollars; to which amount we acknowledge ourselves jointly and severally bound.

(Sig.) JAMES A. MURRAY.
" GREEN MAJORS.

TERRITORY OF MONTANA, } ss:
County of Silver Bow, }

James A. Murray and Green Majors, being severally sworn, each for himself deposes and says that he is one of the sureties to the within undertaking, and that he is worth the amount therein specified as the penalty thereof over and above all debts and liabilities and property exempt by law from execution.

29 (Sig.) JAMES A. MURRAY.
" GREEN MAJORS.

Subscribed and sworn to before me this 21st day of January, 1889.

(Sig.) WM. SCALLON,
Notary Public.

Endorsed: Filed Jan. 21st, 1889. (Sig) Frank E. Corbett, clerk.

30 *Clerk's Certificate.*

Title of Court and Cause.

I, Frank E. Corbett, clerk of the above-entitled court, do hereby certify that the foregoing transcript, from page one to page twenty-nine, both inclusive, contains full, true, and correct copies of certain of the files, papers, pleadings, and orders in the case of Silas F. King *vs.* The Amy & Silversmith Consolidated Mining Company, file number 1937 of the records of said court, as follows, to wit: Complaint, answer, replication, findings of fact, opinion of the judge, judgment by the court, notice of appeal, and undertaking on appeal.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 21st day of January, A. D. 1889.

[SEAL.] FRANK E. CORBETT, *Clerk.*

31 *Proceedings in the Supreme Court of the Territory of Montana.*

JULY 8TH, 1889.

This cause was set down for hearing on Friday, July 19th, 1889.

WEDNESDAY, *July 24th*, 1889.

This cause was argued and submitted.

OCTOBER 5TH, 1889.

Ordered that this cause be reargued before the supreme court of the State of Montana.

32 *Proceedings in the Supreme Court of the State of Montana.*

APRIL 15TH, 1890.

This cause was set down for hearing on Friday, April 25th, at 10 o'clock a. m., in the year of our Lord one thousand eight hundred and ninety.

SATURDAY, *April 26th*, A. D. 1890.

This cause was argued, submitted, and taken under advisement by the court.

WEDNESDAY, *May 21st*, A. D. 1890.

This cause came on this day for the judgment and decision of the court on appeal; whereupon, on consideration, it is now here ordered and adjudged by this court that the order and judgment of the court below made and entered in this cause on the 29th day of December, A. D. 1888, be modified in this particular: That the plane bounding the portions of the dip of the Amy vein lying north of and outside of the Amy north side line shall be drawn from the point where the apex crosses that north side line and in a direction north 3 degrees west.

The case is remanded, with directions to the district court to enter judgment accordingly.

William H. De Witt, associate justice, delivered the opinion, Henry N. Blake, chief justice, and Edgar N. Harwood, associate, concurring.

33 Supreme Court of Montana.

SILAS F. KING, Plaintiff and Appellant,
against
THE AMY AND SILVERSMITH CONSOLIDATED MINING COMPANY, Defendant and Respondent.

Statement of Facts Prepared by the Judge who Delivered the Opinion.

The plaintiff is the owner of the undivided three-fourths of the Non-consolidated mining claim. The defendant is the owner of the other undivided fourth. The defendant is the owner of the Amy claim. The northerly side line of the Amy is the southerly side line of the Non-consolidated. The west end line of the Amy is 491 feet long and runs south 30 degrees west. The east end line is the same length and course. The north side line is 1,470 feet in length and runs south 66 degrees 30 minutes west. The south side line is the same length and course. The vein of the Amy claim on its onward course, or strike, passes through the north side line, and the apex thereof crosses said side line at a point 184 feet easterly from the west end line, and passes into the Non-consolidated ground. Said

vein runs on northwesterly, and does not again enter the Amy ground. The apex of the Amy vein passes out of the south side line of the location at a point between the southeast corner of the Amy and a point 600 feet westerly therefrom. The dip of the vein is to the north. Four hundred and eleven feet of the north line of the Amy, commencing at a point seventeen feet east of the northwest corner forms the south line of the Non-consolidated. The west end line of the Non-consolidated is 181 feet in length, and runs south 1 degree forty minutes west. The east end line is 10 feet long, and the same course. The north side line is 372 feet long and runs north 88 degrees 55 minutes west.

Each claim was *was* located and patented subsequent to the passage of the United States mineral land act May 10, 1872, and the amendments thereto, and is subject to the provisions of those laws.

The plat on page —, figure 1, indicates the surface lines of the two claims and the direction of the strike of the vein.

The plaintiff's action is for partition, and accounting, against the defendant, alleging that defendant has taken large quantities of ore from subterranean workings at a point north of the Amy north-side line, which is the Non-consolidated south side line. The only controversy is, as to where the vertical end line bounding plane should be drawn downward as a limit of the mining operations of the defendant.

Plaintiff contends that the Amy north side line should be considered the end line of that claim for all purposes, and that through that side line the vertical plane should be drawn downward perpendicularly, beyond which, to the north, the Amy Company cannot follow the vein on its strike or dip.

The defendant's position is, that the vertical bounding plane, limiting its rights, must be drawn downward at the point where the Amy apex crosses the north side line of the claim, such plane to be parallel to the planes of the end lines as located by the Amy.

On the trial, the court took a view at variance with those of both plaintiff and defendant, and held that the bounding plane must be placed at the point where the apex crosses the north side line of the Amy, but that such plane must be drawn downward at a right angle to the strike of the vein at that point. The plat, figure 1, indicates the positions of the three planes described. They intersect at a common point (*c*, on the plat), viz: the point of departure of the apex from the Amy exterior boundaries.

(Here follows plat marked p. 34.)

35 Judgment was entered in accordance with the views of the district court. The plaintiff appeals.

The case comes before this court as a triangular contest. Since the decision below, the learned judge who tried the case appears as counsel for the respondent, and urges the theory for the respondent, which the court below adopted. Co-counsel for respondent pre-

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Fig. 1.

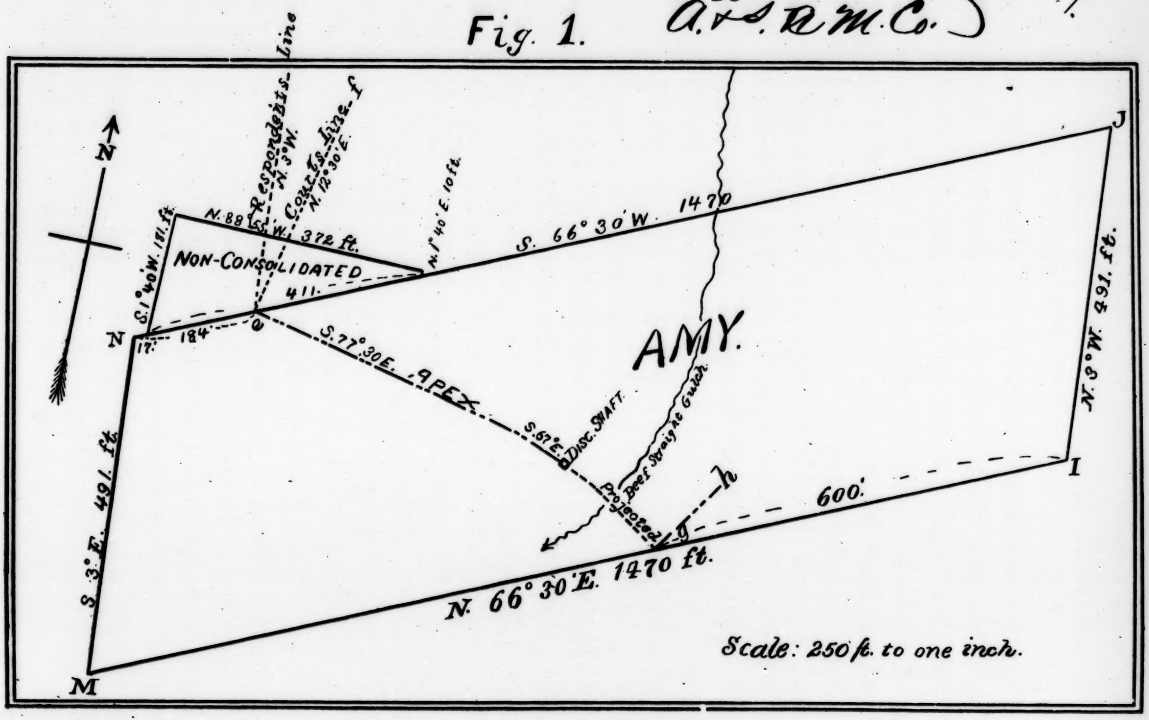

Fig. 1.

sents the theory which he held below. Appellant's position is as it was in the district court.

For convenience in terms we will designate these theories as follows: 1st. The doctrine adopted by the court below will be called the court's theory, and line and plane. 2d. That contended for by the appellant, the plaintiff below, the appellant's. 3d. That urged by the respondent, the defendant below, and presented by one of its counsel here, as the respondent's.

The point where the ore was taken out by the defendant is north of the appellant's plane, and east of each of the two other planes. Whether the court's or respondent's view is adopted is practically immaterial to the respondent, but the principles involved are vitally at variance. A decision as to which theory of the plane is the law in the case is the whole and only controversy. That decision will settle the title to the portion of the vein from which the ore was taken.

Mr. Justice De Witt, after stating the foregoing facts, delivered the following opinion:

The case at bar involves the construction of section 2322 Revised Statutes United States, or rather, the application of the facts of the case to that statute.

"SEC. 2322. The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all * * * veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations; but their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

As said by Mr. Justice Field (Iron Silver Mining Company *vs.* Elgin Mining Company, 118 United States, 206): "This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. The difficulty arising from the section grows out of its application to claims, where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein."

We may add to these words, that further difficulties arise, when we are obliged to apply the statute to facts not wholly within its contemplation. If a mining location be made regularly, made so that the strike of the vein crosses the location from end line to end line, and at right angles to said end lines, there is nothing in the statute to construe or interpret. Mining Co. *vs.* Tarbet, 98 U. S., 469; Iron S. M. Co. *vs.* Elgin M. Co., 118 U. S., 205; Argentine Co. *vs.* Terrible Co., 122 U. S., 485. "There is no patent or latent ambiguity." But when veins, or their strike cross the side lines, or a side line and end line, at all conceivable angles, difficulties confront

the courts, that can best be fully met by legislative aid. Until such aid is invoked, the courts must follow the statute and previous construction as closely as the varying facts permit. Iron S. M. Co. *vs.* Elgin M. Co., 118 U. S. 208. The history of mining has proven that the law of May 10, 1872, and amendments thereto, do not afford clear, adequate and simple solution for some of the practical conditions that arise in the development of the mining industry. The case at bar is a notable instance. It is a first impression in this court, and all other appellate courts.

Three solutions of this interesting problem are urged upon our consideration. Neither one is absolutely free from possible criticism, in view of prior construction of the statute, applied to cases
36 where *theirs* the facts departed from the regularity seeming to be contemplated by the law. The facts in this case we cannot ascertain have ever been before any court. We do not approach the consideration of the case with the assurance that we might possess, were we able to follow a path that had heretofore been even partially opened. The situation is such that we do not feel prepared to pronounce an *ex cathedra* utterance. We are obliged to plough a furrow*gh* in virgin soil. It will be our endeavor to apply a view to the facts, which shall seem to us most consonant with the true intent of the statute, and most in accord with the adjudicated cases in the United States Supreme Court, wherein the rights claimed under irregular locations have received the consideration of that court.

Without attempting scientific discussion, we believe that we can give a few practical definitions, to indicate the sense from the miner's point of view, in which we shall use certain terms in this opinion.

Experience has shown that the precious mineral deposits, (except what are commonly called placers,) as a rule lie in veins. Mr. Justice Miller (Iron Silver Mining Co. *vs.* Cheesman, 116 U. S. 531) says: "What constitutes a lode or vein of mineral matter has been no easy thing to define. In this court no clear definition has been given. On the circuit it has often been attempted." Mr. Justice Field, in the Eureka case, 4 Sawyer, 302, says: "A fissure in the earth's crust, an opening in its rocks and strata, made by some force of nature, in which the mineral is deposited, would seem to be essential to a lode in the judgment of geologists. But, to the practical miner, the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of Congress, is applicable to any zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock," the "neighboring rock" being called in the miner's language the country, or the country rock.

A vein, to the miner, is a body of ore, quartz, or mineral-bearing substance, lying within the crust of the earth, bounded on each

side by the country rock, greatly varying — width, and extending in length, across and through the country for greater or less distances. The direction of the vein so across and through the country is called the strike. The direction of the vein, as it goes downwards into the earth, is called the dip. The dip, in different veins, and in the same vein sometimes, varies from a perpendicular to the earth's surface to an angle perhaps only a few degrees below the horizon.

The dip is spoken of from three different points of view: 1. As to its inclination from a perpendicular to a horizontal, as so many degrees from the perpendicular or from the horizontal. A vein is thus described as having a dip of 20 degrees, 30 minutes, etc. 2. As to the direction it takes from the strike or apex, by the points of the compass. If the strike were due east and west and the vein in its course downward departed from the perpendicular at an angle, so that a perpendicular shaft sunk at the apex would leave the vein to the north of such shaft, the dip, in this point of view, would be said to be due north, or, the conditions reversed, due south. In this respect the dip, that is the direction of the dip, is said to be, and is, at right angles to the strike. 3. The dip is again spoken of as the portion of the vein successively encountered in going down and away from the apex. The miner follows the dip when he works downward, leaving the apex further from and above him at each advance. He follows the strike when he works lengthways of the vein on a level—that is, when he is advancing along the vein, neither rising towards the surface of the ground nor descending, but going on a level with the plane of the earth's surface.

A failure to distinguish these three views of the dip in using the word sometimes leads to confusion. As we shall use the term dip frequently hereinafter, for the sake of definition, let us call the dip from the first point of view the inclination dip; the second, the compass dip, and the third the practical dip, for this is the practical idea of the miner when he speaks of following his dip.

37 Under these definitions a vein absolutely perpendicular to the plane of the earth's surface, an occurrence rarely if ever encountered, has no inclination dip or compass dip. It has only the practical dip. But in actual mining, veins possess a dip from all three points of view. Keeping these definitions in view, we believe that some expressions of courts and arguments of counsel become more clear. This word dip is not used in the act of Congress, cited above. The expression there is "course downward." Dip is the miner's word which has attained the significations above defined.

The highest point of such vein, or body, as we have described, is the apex. The apex may, or may not, reach the surface of the ground.

The United States mineral law gives to the miner the whole of every vein the apex of which lies within his surface exterior boundaries, or which lies within perpendicular planes drawn downward indefinitely on the lines of those boundaries. The miner may fol-

low the dip, using the word in either of its significations, wherever it goes, provided he has the apex as a basis of operations, and that he does not cross the vertical planes of the end lines. The intent of the statute is to give the miner a section or block of the vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location, and of a depth as far as he desires or is able to work downward, and that at the most remote depth attained he shall have the same number of feet on the strike as he had at the apex. I. S. M. Co. *vs.* Elgin M. Co., 118 U. S. 205. It seems that such grant by the statute to the miner, in view of the geological facts and history of veins and particularly their almost universal tendency to depart from a perpendicular in their course downward, was deemed to secure to him a more satisfactory title than he would obtain if he were compelled to locate a parallelogram on the surface of the earth, as under the Spanish mining law, and take all, and only that portion of the solid contents of the earth included in a parallelopipedon formed by dropping vertical planes downward on the line of each side of such parallelogram. And the intent of the statutory grant of section 2322 is, that the miner may follow his vein, on the dip, but not on the strike, if it departs from the parallelopipedon indicated.

Therefore, if the miner locates his claim regularly, that is as the statute contemplates that he will, he has all that the statute intends to give him. "See cases cited *supra*. If he will not, or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences." (Iron S. M. Co. *v.* Elgin M. Co., 118 U. S. 207.) That is, he takes less of the apex and strike than he would obtain by a regular location, and consequently less of the dip.

But, in order for the miner to make his location in exact conformity with the intent of the law, he must know, when he fixes his exterior boundaries, what the true strike of the vein is. If he knows this, he will locate so that the strike shall pass through the middle of each end line, leaving three hundred feet of surface ground on each side of the vein. But the true strike is often ascertainable only after immense sums of money are expended in development. He has twenty days, under our statute, to determine this important matter which may take years to fully demonstrate. If in this helpless condition the prospector commits an error of geological judgment, and upon such error he expends the toil of years, and that toil has wrought its reward, we are of the opinion that the statute should be so construed as will come the nearest to giving to him that whole section, or block of the vein, which we have above indicated that it is the intent that he shall have as is consistent with the amount of apex which he has happened to secure by his surface lines and their planes extended downward.

In the light of these views, we will proceed to examine the three theories of the end-line plane, presented for our consideration.

First. The court's theory.

In this view the line that fixes the bounding plane is at right angles to the strike of the vein at the point where it leaves the

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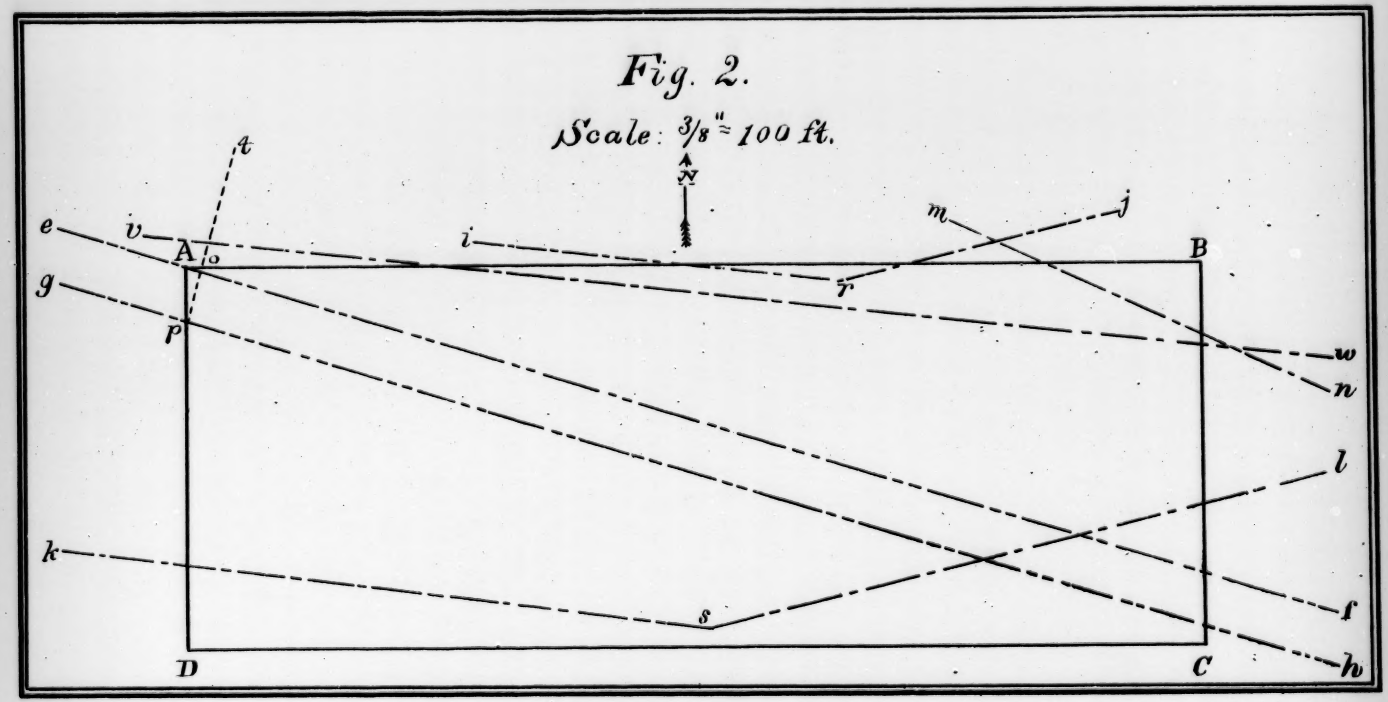
Fig. 2.

Scale: 3/8" = 100 ft.



Amy north side line on figure 1, p. —. The line is indicated by the letters *e*, *f*. The plane drops perpendicular from that line.

(Here follows diagram marked p. 38.)

Counsel for appellant calls this a judicially established plane, a plane created by the court and not by one of the location
39 lines. Respondent's counsel, who holds this theory, vigorously protests against this term, and asserts that the plane is not judicially established, but is that intended by the statute. This, however, is only a terminological contention. Our own infirmity of language is such that we cannot better designate this line and plane than *us* does appellant. It is, in no sense, an original line or plane of the surface boundaries as located, nor a projection of, or parallel to, any of them. It is not a line fixed by location, nor ever fixed, except by the decree of the court below.

The United States Supreme Court cases cited by all the counsel are: Mining Company *vs.* Tarbet, 98 U. S. 463; the Flagstaff case. Iron Silver Mining Company *vs.* Elgin Company, 118 U. S. 196; the Horseshoe case. Argentine Company *vs.* Terrible Company, 122 U. S. 478.

If there be one legal principle that is announced with more clearness and frequency, than all others, throughout all these cases, it is that "the boundary planes shall be definitely determined by the lines of the surface location, and that they shall not be subject to perpetual readjustment according to subterranean developments made by mine workings." Elgin case, 207; see also 205 and 206.

The bounding planes must be drawn by reference to the original surface lines, and may not be established arbitrarily at the judgment of the parties, or the courts at a later day. The original location fixes the planes.

We are forced to conclude that the court's theory is not in accord with this principle. The plane established is purely a judicial one. It has neither parallelism or coincidence with, or projection from, or reference to, the planes of any of the original surface lines. It is not "determined by the lines of the surface location." It was never marked on the ground by the location, nor is it referable thereto.

The whole theory of the advocate of this position is based upon the fact that he takes but one view of the dip, that which we have called the compass dip. The dip, in this respect, is, as counsel insists, at right angles to the strike. Then, from this single point of view, he argues, that when the miner follows the dip, he may go downward from the apex, only at right angles to the strike, and limited further by the planes of the original location end lines. We take his own language from his brief, as follows:

"The judge before whom the trial was had held, that lines drawn at right angles through the vein or lode where it crossed the side lines, and these lines extended in the direction of the dip of the vein until it intersects a vertical plane drawn downward through the end lines of the location and continued in the same direction to

the place of intersection, constituted the true dip of the vein, and the part which the locator was entitled to follow in its downward course."

This is a fair and succinct statement of the position of the court below, and counsel here.

We cannot but remember that this case not only determines the rights of the parties hereto, but that the decision will form an important precedent for future adjudication in the courts of this State. If we adopt the court's theory we must abide by its legitimate consequences. The planes in this case would be drawn on the lines *e*—*f* and *g*—*h*, figure 1. He must then follow the plane G—H until it meets the plane of the east original end line, the I—J, on the figure extended in its own direction northerly, which latter plane, in its northward course, afterwards meets the plane *e*—*f*. Thus three end line planes operate as boundaries, and the portion of the vein that the miner takes runs to a point. This result cannot be the intent of the statute. This is not the section or block of the vein, in its entire depth, which the law intends to grant.

Again, in figure 2, on page —, let a parallelogram, A—B—C—D, represent a location. The strike of the vein crosses the location, entering the east end line near the southeast corner, and passing out of the west end line near the northwest corner, as the G—H on the figure. The inclination of the dip is northerly. Counsel's westerly boundary plane on his theory would run northeasterly, at right angles to the strike at the point of departure from the west end line, the line *p*—*t* on the figure. The section of the vein taken, again runs to the point of a wedge. The miner is deprived of the portion of the vein on the dip, lying north of the north side line, and between the plane of his artificially established end line, and the plane of the original west end line, the line *o*—*t*, D. A., projected in its own direction. This portion of the vein, it has never before been doubted, that we are aware, would belong to the owner of the apex of the vein, *g*—*h*, lying between the protected planes of the located end lines.

40 Again the vein may enter an end line and pass out of the side line, as the line M—N in figure 2; or take a deflection, as the line *i*—*r*—J or K—S—*l*. These are possible and quite probable, and we believe actual occurrences, in fact. The application of counsel's theory leads to results from which we must retreat. In fact, in innumerable practical examples, where a claim is not located with absolute statutory regularity, the miner is entirely cut off from following his dip, and cut off at a greater or less depth, depending upon the inclination of the dip, and the angle at which the strike passes out of a surface line.

In the case before us the court drew the boundary plane at right angles to the strike as it seemed to be demonstrated, at the point of departure from the north side line. The departure at the south side line is not definitely determined. If, in its course over the Amy location, the vein takes a deflection, as seems probable from the findings of the court, the court's bounding planes will not be

parallel, and the portion of the vein secured will run to a point or into a fan-shaped section.

If the court would draw the planes by reference to the general average strike of the vein throughout its whole extent, this could not be accomplished until extensive developments had been made on the vein over, perhaps, many locations thereon.

We are of the opinion that the view of the district court is not sustained by the statute or the adjudicated cases, and that its adoption threatens the security of mining titles. We are, therefore, obliged to disavow its doctrine.

This conclusion, however, does not determine the case. We are compelled to announce a construction of the law and the facts upon which judgment may be ordered entered below. This involves a discussion of the appellant's and respondent's theories. We will first examine the former.

2. The appellant's theory.—The controlling principle of section 2322, and the decisions thereunder, is that the miner has title to all veins the apex of which lies within the vertical planes of his surface lines, although such veins, in their inclination on their course downward, cross the vertical plane of a side line, provided that such exterior parts lie within the projected planes of the end lines.

We are unable to escape the conclusion that the application of the appellant's theory, in the case before us, violates this principle. Referring to the plat, figure 1, it will be seen that if the Amy people go down upon their dip (using the word in any of its significations, and especially as to the compass dip) from any point on the apex, they will, at greater or less depth, depending upon the distance from the point where the apex crosses the north side line, encounter the vertical plane of that line; and, if that plane is to cut them off upon the dip and be the end line, the provisions of the statute, and the universally accepted construction of the mining law, are plainly subverted. Counsel holds that if the strike cross a side line that such side line becomes an end line for all purposes. A better illustration of the revolutionary character of the theory could scarcely be presented than the one at bar. But if it be correct we must not shrink from its necessary results. Side lines are frequently not parallel. If the strike crosses two side lines not parallel, and these are made end lines, the section of vein taken constantly narrows, if the inclination be towards the small end of the location or widens, if the inclination be in the other direction. In fact, all the suppositious cases applied to the court's theory, develop equal disasters under the one now considered. Referring again to figure 2, the vein indicated by the line *m*—*n* or *r*—*w* will have bounding planes not parallel, but at an angle to each other and often a right angle. If the compass dip were northeasterly, the section acquired quickly runs to a point. If it was southwesterly, it would develop into a fan of infinite proportions, unless we applied the two other lines of the claim as end lines, and had four in operation. The vein *i*—*r*—J would have end lines coincident—that is, there would be but one end line. The single plane of the north side line would cut off a northerly dip in a short distance downward, or, if the dip

were southerly, would counsel call into requisition the original end lines after the vein passed the south side line plane, and have three end lines taking effect?

And here we stop to observe that in the discussion of each of the theories we are considering the effects of the doctrines upon the portions of the vein on the dip, lying outside of the vertical planes of the side lines. Those portions inside the vertical planes
41 of the surface lines of the location, are controlled by the general provisions of section 2322.

The appellant's view was urged in a learned argument by counsel; but, we feel that we must conclude that, in the case at bar, it seems to be contrary to the theory and intent of the mining law. We are constrained to disavow the doctrine.

3. The respondent's theory.—We have arrived at our approval of this doctrine, partially upon what the logicians call the principle of exclusion. We believe, however, that the position is independently sustainable by its own reason, and upon previous construction. Its advocate also, protests against calling his line or plane a judicially established one, and contends that it is established by the original surface lines, that is, by reference thereto, under the control thereof, and in accordance therewith. In the Elgin case, 118 U. S., 206–'7–'8, we find the following, in the opinion of Mr. Justice Field:

"The surface lines extended downward vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn down through the end lines. This means the end lines of the surface location, for all locations are measured on the surface. * * * It is better that the boundary plane should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment according to subterranean developments made by mine workings. * * * The provision of the statute that the locator is entitled throughout their entire depth to all the veins, lodes, or ledges, the top or apex of which lies inside the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. * * * This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the Flagstaff case."

From those utterances, and from the tenor of this case, as well as the Flagstaff and Argentine cases, we believe that we may conclude that the bounding planes sought to be applied in the respondent's theory to the facts of the case at bar may properly be said to be "determined by the lines of the surface location."

In the Flagstaff case and the Argentine case the strike of the vein was at right angles to the side line of the location, or, as the court in the former case says, practically so, and for the purposes of the decision treated as such. Therefore, in those cases, the vital matter before the court was not a question of the dip, but rather one of the strike, and the spirit of those cases seems to us to be that when the strike passes out of the location, through any surface

line, that surface line and its vertical plane, cut off the strike, and the miner may not follow the strike beyond such plane.

We are aware that there is language used in the Argentine case that looks toward the adoption of the appellant's theory, herein in the sense that the side line, under the circumstances of the case at bar, must be an end line to limit, by its vertical plane the dip, as well as to stop the pursuit of the strike. But there is a vital difference between the facts of the Argentine case and those now before us, and the language therein must be viewed in connection with the facts in the case before the learned justice. Chief Justice Marshall, in Cohens *vs.* Virginia, 6 Wheat. 399, says: "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

42 Mr. Justice Field is the judicial father of the mining law of the United States. By his legal learning, and his practical knowledge of mining, he has illumined the path of the history of mining adjudications. His words in the Argentine case, and those of Mr. Justice Bradley in the Flagstaff case, were not spoken of a state of facts such as those now before this court; and, we cannot consent that those distinguished jurists would admit that their language sanctions the doctrine that appellant applies to the Amy, Non-consolidated situation.

Turning to the Horseshoe case, the other of the three leading cases cited, the facts were also entirely variant from those now before us.

These three United States cases have compelled that court to endeavor to cast into the procrustean bed of the statute individuals that strained the mould into which they were forced. But we believe that we may legitimately conclude from those cases that, in the facts now before us, the principle is, that the north side line of the Amy terminates the strike of the vein; and that the dip must be controlled by the planes of the original end lines. The Amy people may follow their dip north of their north side line, but only as it lies between the planes of their end lines as below considered. The object of parallelism in the end line is that the locator may have his full section of the lode in its entire depth. But the determination of the strike of the Amy at a point on the side line deprives them of the dip northwest of that point, because the dip, in that portion, lies under the apex of the Non-consolidated. The law intends that the plane of the end line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end line, as in a regular location,

the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end-line plane, that plane must take effect where the strike in fact ends, that is, at a point on the side line (point *c*, figure 1). And, if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east end line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially constructed. It is determined by the location lines on the surface. There is never any readjustment according to subsequent developments. The parallelism of the end-line planes is fixed by location, and never varies. The point of departure of the strike from the surface lines fixes the point where the end-line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line.

Complications are soluble upon this theory. The intent of the statute seems to be secured.

We will notice some objections made to this doctrine, but which we believe are not sustainable. It is urged that the principle will not apply to a vein, the strike of which crosses the location at exact right angles to the side lines. But here there would be no dip in question. The side line would bound the strike, as in the Flagstaff case.

Again it is suggested: The Non-consolidated surface location happens to be almost exactly parallel, in its lines, to the Amy. If the Non-consolidated had been located with its end lines at right angles to the strike of the vein in the Non-consolidated ground—that is, parallel to the court's line, figure 1—then, it is objected that if the Non-consolidated go down on the dip, within the planes of such end lines, and the Amy go down within the planes as we define them, a collision would occur underground. If so, such conflict would be adjustable, by priority of title.

Again, it is urged, that the Amy has an apex on the surface of a length, as it runs from south to north side line, but that, under this theory, at a depth, the strike is shorter, and only of a length equal to the shortest distance between the bounding planes. This objection is based upon an error in the geometrical view, as may readily be shown by descriptive demonstration. A level, run on the vein at 100, 500, 1,000 or any number of feet in depth, would be parallel to the strike at the highest point, and of equal length.

Of the three theories which have been presented to us for application to this case, we approve and adopt the last considered.

In accordance with this view, let the judgment in the district court be modified in this particular, that the plane bounding the portions of the dip of the Amy vein, lying north of, and outside of the Amy north side line, shall be drawn from the point where the apex crosses that north side line, and in a direction N. 3 degrees W.

The case is remanded with directions to the district court to enter judgment accordingly.

WILLIAM H. DE WITT,
Associate Justice.

We concur.

HENRY N. BLAKE,
Chief Justice.

E. N. HARWOOD,
Associate Justice.

43 IN THE SUPREME COURT OF MONTANA, } ss:
County of Lewis & Clarke. }

I, W. J. Kennedy, clerk of the supreme court of the State of Montana, hereby certify that the foregoing forty (40) pages contain a full, true, and correct copy of the transcript of the proceedings in this case, viz., Silas F. King *vs.* Amy & Silversmith Consolidated Mining Co., in the district court of Silver Bow county, second judicial district of Montana, as they appear of record in my office certified to by the clerk of the aforesaid district court, and also a complete record of all the proceedings had and entered in the trial of this cause in the supreme court of the Territory of Montana and also in the supreme court of the State of Montana.

Given under my hand and the seal of the said court this 2nd day of July, in the year of our Lord one thousand eight hundred and ninety.

[Seal Supreme Court, Montana Territory.]

W. J. KENNEDY,
Clerk of the Supreme Court of the State of Montana.

This writ of error is allowed &, pursuant to telegram, made part hereof, from attorneys for the parties, the penalty of the supersedeas bond is fixed at one thousand dollars this July 17, 1890.

JOHN M. HARLAN,
Asso. Justice Sup. Ct U. S.

44 In the Supreme Court of the State of Montana.

SILAS F. KING, Plaintiff and Appellant, *versus* AMY & SILVERSMITH CONSOLIDATED MINING COMPANY, Defendant and Respondent.	Appeal & Allowance.

The above-named plaintiff and appellant, Silas F. King, conceiving himself aggrieved by the order and decree entered on May 21st, 1890, in the above-entitled proceeding, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree were

made, duly authenticated, may be sent to the Supreme Court of the United States.

WM. SCALLON AND E. W. TOOLE,
Attorneys for Plaintiff and Appellant, Silas F. King.

Helena, Montana, June 13th, 1890.

And now, to wit, on June 21, 1890, it is ordered that the appeal be allowed as prayed for.

HENRY N. BLAKE,
Chief Justice.

45 [Endorsed:] No. —. Silas F. King *versus* Amy & S. C. M. Co. Appeal and allowance. Filed June 21st, 1890. W. J. Kennedy, clerk supreme court.

46 In the Supreme Court of the State of Montana.

SILAS F. KING, Plaintiff and Appellant,
versus
AMY & SILVERSMITH CONSOLIDATED MINING COMPANY, Defendant and Respondent.
} Citation on Appeal.

UNITED STATES OF AMERICA,
District of Montana, County of Silver Bow, } ss:

To The Amy & Silversmith Consolidated Mining Company, defendant and respondent, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the 2nd Monday of October, 1890, pursuant to an appeal filed in the clerk's office of the supreme court of Montana, wherein Silas F. King is appellant and yourself, The Amy and Silversmith Consolidated Mining Company, is respondent, to show cause, if any there be, why the order, judgment, and decree in the said appeal mentioned should not be corrected and speedy justice should be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of June, in the year of our Lord one thousand eight hundred and ninety.

HENRY N. BLAKE,
Chief Justice.

We hereby accept service of the foregoing citation this 16th day of July, 1890.

W. W. DIXON,
JOHN F. FORBIS,
Att'ys for Def't.

47 [Endorsed:] No. —. Silas F. King *versus* Amy & S. C. M. Co. Citation on appeal. Filed June 21st, 1890. W. J. Kennedy, clerk supreme court.

48 In the Supreme Court of the State of Montana.

SILAS F. KING, Appellant,
versus
AMY & SILVERSMITH CONSOLIDATED MINING COMPANY, Respondent.
} Supersedeas Bond.

Know all men by these presents that we, Silas F. King, James A. Murray, and John M. Stewart, all of the county of Silver Bow, Montana, are held and firmly bound unto the above-named respondent, The Amy & Silversmith Consolidated Mining Company, in the sum of one thousand dollars, to be paid to the said Amy & Silversmith Consolidated Mining Company, its successors or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 16th day of June, 1890.

Whereas the above-named Silas F. King has prosecuted an appeal to the Supreme Court of the United States to reverse the decree entered in the above-entitled suit by the supreme court of Montana:

Now, therefore, the condition of this obligation is such that if the above-named Silas F. King shall prosecute said appeal to effect and answer all damages and costs if he fail to make good said appeal, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

49 JAMES A. MURRAY. [SEAL.]
JOHN M. STEWART. [SEAL.]

UNITED STATES OF AMERICA, }
State of Montana, County of Silver Bow, } *ss:*

James A. Murray and John M. Stewart, being severally duly sworn, each for himself deposes and says—

That he is one of the sureties to the foregoing bond, and that he is worth the amount named therein over and above all his debts and liabilities and property exempt by law from execution.

JAMES A. MURRAY.
JOHN M. STEWART.

Subscribed and sworn to before me this 16th day of June, A. D. 1890.

WM. SCALLON,
[SEAL.] *Notary Public in and for Silver Bow County.*

Approved by—
HENRY N. BLAKE,
Chief Justice.

50 (Endorsed:) Silas F. King *versus* Amy & S. C. M. Co. Supersedeas bond. Filed June 21st, 1890. W. J. Kennedy, clerk of the supreme court.

51 Supreme Court of the State of Montana.

SILAS F. KING
versus
AMY & SILVERSMITH CONSOLIDATED MINING COMPANY. } Stipulation.

We agree that the amount of the supersedeas bond may be fixed at one thousand dollars.

FORBIS & FORBIS,
Attorneys for Respondent.

Dated Butte, Montana, June 12th, 1890.

(Endorsed:) Supreme court of Montana. Silas F. King *versus* Amy and Silversmith Consolidated Mining Company. Stipulation as to amount of supersedeas bond. Filed June 21st, 1890. W. J. Kennedy, clerk of the supreme court.

52 In the Supreme Court of the State of Montana.

SILAS F. KING, Plaintiff and Appellant,
v.
AMY AND SILVERSMITH CONSOLIDATED MINING COMPANY, Defendant and Respondent.

UNITED STATES OF AMERICA,
District of Montana, County of Silver Bow, } ss:

James A. Murray, being duly sworn, deposes and says that he is well acquainted with the premises in controversy in this action and with their value; that the matter in dispute herein, exclusive of interests and costs, exceeds the sum and value of five thousand dollars and exceeded said sum and value on the 21st day of May, A. D. 1890, to wit, at the time of the rendition of the decision in the above-entitled court in this cause.

JAMES A. MURRAY.

Subscribed and sworn to before me this 22nd day of August, 1890.

WM. SCALLON,
[SEAL.] *Notary Public, Silver Bow Co., Montana.*

53 (Endorsed:) Silas F. King *versus* Amy & Silversmith Con. M. Co. Affidavit as to value. Filed June 21st, 1890. W. J. Kennedy, clerk of the supreme court.

54 IN THE SUPREME COURT OF MONTANA,
County of Lewis & Clarke, } ss:

I, W. J. Kennedy, clerk of the supreme court of the State of Montana, hereby certify that the foregoing ten (10) pages, commencing with page forty-two (42) and ending with page (51) fifty-one, contain full, true, and correct copies of the appeal & allowance & cita-

tion, supersedeas bond, stipulation, & certificate of value on appeal to the Supreme Court of the United States in the case of Silas F. King *vs.* The Amy & Silversmith Consolidated Mining Company, which are now on file in my office.

Given under my hand and the seal of the supreme court of this State this 23rd day of July, in the year of our Lord one thousand eight hundred and ninety.

[Seal Supreme Court, Montana Territory.]

W. J. KENNEDY,
Clerk of the Supreme Court of the State of Montana.

55 In the Supreme Court of the United States.

SILAS F. KING
v.
THE AMY AND SILVERSMITH CONSOLIDATED MINING COMPANY. } In Error.

To the supreme court of Montana:

Now comes the said Silas F. King, plaintiff in error, and says that in the record and proceedings in the above-named case there is error in this, to wit:

1. The said supreme court of Montana erred in not awarding to the plaintiff in error the premises and mineral in controversy in said cause.

2. The said court erred in awarding the premises and mineral in controversy to the said Amy & Silversmith Consolidated Mining Company.

56 Wherefore the said plaintiff prays that said decree and judgment may be reversed and that he may be restored to all things he has lost by reason thereof.

WALTER H. SMITH,
Att'y for Pl'ff in Error.

57 [Endorsed:] Silas F. King *vs.* The Amy and Silversmith Consolidated Mining Company. Specification of errors. In the Supreme Court of the United States. Filed July 23rd, 1890. W. J. Kennedy, clerk supreme court of Montana.

58 Form No. 1.

The Western Union Telegraph Company.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

This is an unrepeated message, and is delivered, by request of the sender, under the conditions named above.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

331 f.

Number.	Sent by—	Rec'd by—	Check.
34 W.	Co.	O.	37, p'd. 13 ex.

2. 16, '90.

Received at 1518 14th St., N. W.
Dated Butte, Mont., 16.

To the Hon. Jno. M. Harlan, Supreme Court, W., D. C.:

As supersedeas bond of one thousand dollars in case of King against Amy & Silversmith Consolidated Mining Company will be satisfactory to all parties.

FORBIS & FORBIS,
Att'ys for Amy & Silversmith Company.

59 Form No. 1.

The Western Union Telegraph Company.

This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message.

Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeated messages beyond the amount of tolls paid thereon, nor in any case where the claim is not presented in writing within sixty days after sending the message.

This is an unrepeated message, and is delivered, by request of the sender, under the conditions named above.

NORVIN GREEN, *President.*

THOS. T. ECKERT,
General Manager.

Number.	Sent by—	Rec'd by—	Check.
			(2.) Harlan.

—— —, 189–.

Received at 1518 14th St. N. W.
Dated ——, —— —, ——.
To Wm. Scallon, att'y for plaintiff in error.

60 [Endorsed:] In the supreme court of Montana. Silas F. King *vs.* The Amy and Silversmith Consolidated Mining Company. Telegram to Asso. Justice Harlan, of U. S. Sup. Ct, as to amount of bond. Filed July 23rd, 1890. W. J. Kennedy, clerk supreme court of Montana. Mr. Smith.

61 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Montana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Silas F. King, plaintiff and appellant, and The Amy and Silversmith Consolidated Mining Company, defendant and respondent, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or

62 of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff and appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of July, in the year of our Lord one thousand eight hundred and ninety.

(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by me this July 17, 1890, with supersedeas, the bond, as agreed by the parties, to be in the penalty of $1,000.

JOHN M. HARLAN,
Asso. Justice Sup. Ct U. S.

63 [Endorsed:] Silas F. King, plaintiff & appellant, *vs.* The Amy and Silversmith Consolidated Mining Co., defendant & resp't. "Writ of error." Issued by Supreme Court of the United States. Filed July 23rd, 1890. W. J. Kennedy, clerk supreme court of Montana.

64 THE UNITED STATES OF AMERICA:

To the Amy and Silversmith Consolidated Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washton on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein Silas F. King is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this 17th day of July, in the year of our Lord one thousand eight hundred and ninety.

JOHN M. HARLAN,
Asso. Justice Sup. Ct U. S.

65 [Endorsed:] Silas F. King, plaintiff & appellant, *vs.* The Amy and Silversmith Consolidated Mining Co., defendant & respondent. "Citation" issued by the Supreme Court of the United States. Filed July 23rd, 1890. W. J. Kennedy, clerk supreme court of Montana.

On this twenty-third day of July, in the year of our Lord one thousand eight hundred and ninety, personally appeared William Scallon before me, the subscriber, and makes oath that he delivered a true copy of the within citation to the defendant therein named by speaking and leaving a copy of the same to and with Charles S. Warren, at Butte, Montana, and that the latter is the secretary of the said defendant in error.

WM. SCALLON.

Sworn to and subscribed the 23rd day of July, A. D. 1890.

[Notarial Seal William T. Caton, Silver Bow County, Montana.]

WM. T. CATON,
Notary Public in and for Silver Bow County, State of Montana.

66 Know all men by these presents that *we*, Walter H. Smith, *are* held and firmly bound unto The Amy and Silversmith Consolidated Mining Company in the full and just sum of one thousand dollars, to be paid to the said mining company, its successors, certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, *we* bind *ourselves*, *our* heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with *our* seals and dated this 17th day of July, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the supreme court, Montana, in a suit depending in said court between Silas F. King, plaintiff, and The Amy and Silversmith Consolidated Mining Company, defendant, a decree was rendered against the said Silas F. King, plaintiff, and in favor of the said Amy and Silversmith Consolidated Mining Company on the 21st day of May, 1890, and the said Silas F. King having obtained the allowance of a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said Amy and Silversmith Consolidated Mining Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Silas F. King shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WALTER H. SMITH. [SEAL].
——— ———. [SEAL.]
——— ———. [SEAL.]

Sealed and delivered in presence of—
——— ———.

Approved by—
JOHN M. HARLAN,
Asso. Justice Sup. Court U. S.

67 (Endorsed:) "Silas F. King, plaintiff and appellant, *vs.* The Amy and Silversmith Consolidated Mining Co., defendant & respondent." "Bond on appeal." Approved by Jno. M. Harlan, asso. justice Sup. Court U. S. Filed July 23rd, 1890. W. J. Kennedy, clerk supreme court of Montana.

68 In the Supreme Court of Montana, County of Lewis & Clarke.

I, W. J. Kennedy, clerk of the supreme court of the State of Montana, hereby certify that the foregoing 9 pages, numbered from 53 to 61, inclusive, contain the original specifications of errors as allowed by Associate Justice Harlan, of the U. S. Sup. C't (said allowance will be found on page 41 of this transcript), original telegram from attorneys as to amount of bond, original writ of error

and original citation as issued by the Supreme Court of the United States, and a copy of bond as approved by said court in the case of Silas F. King *v.* The Amy & Silversmith Consolidated Mining Company, certified copies of all which are now on file in my office, save and excepting the bond herein mentioned, the original of which I have retained.

Given under my hand and the seal of the supreme court of the State of Montana this 23rd day of July, in the year of our Lord one thousand eight hundred and ninety.

[Seal Supreme Court, Montana Territory.]

W. J. KENNEDY,
Clerk of the Supreme Court of the Great State of Montana.

Endorsed on cover: Case No. 14,131. Montana sup. court. No. 169. Silas F. King, appellant and plaintiff in error, *vs.* The Amy & Silversmith Consolidated Mining Company. Filed September 4, 1890.

Office Supreme Court U. S.
FILED.
DEC 7 1893
JAMES H. McKENNEY,
CLERK.

Office Supreme Court U. S.
FILED.
NOV 25 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

SILAS F. KING, APPELLANT AND PLAINTIFF IN ERROR,

vs.

THE AMY & SILVERSMITH CONSOLIDATED MINING COMPANY.

No. 169.

Appeal from and in Error to the Supreme Court of Montana.

BRIEF FOR PLAINTIFF IN ERROR.

WALTER H. SMITH,
C. W. HOLCOMB,
Attorneys for Plaintiff.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1893.

Supreme Court of the United States.

OCTOBER TERM, 1893.

SILAS F. KING, APPELLANT AND PLAINTIFF IN ERROR,

v.

THE AMY & SILVERSMITH CONSOLIDATED MINING COMPANY.

No. 169.

Appeal from and in Error to the Supreme Court of Montana.

STATEMENT.

On the 8th day of July, 1889, the said plaintiff, King, filed his complaint against the said defendant, the Amy and Silversmith Consolidated Mining Company, in the district court of the second judicial district for the county of Silver Bow, in the State (then Territory) of Montana. In this complaint he alleged that he was the owner in fee of three undivided fourths of the mining claim known as the Non-Consolidated, designated in the United States land office as lot No. 466, together with the veins, minerals, ores, and metals therein, and particularly those portions of that vein and ledge situated within the vertical

planes of the southern boundary of said claim and its other boundaries, which is now opened and developed by shafts and underground workings, and which passes in its onward course and strike from and out of an adjoining claim known as the Amy and official lot No. 246, through the latter's northerly boundary line and its vertical plane (or northwesterly boundary line and plane, as it may also be called) into the said Non-Consolidated claim, and through the latter to its western boundary, as plaintiff alleges on information and belief, and that he was in possession thereof; that the defendant owned one undivided one-fourth part of said premises in fee and was in possession thereof. The said complaint described the premises by metes and bounds.

It further alleged that the said defendant, from the 7th day of October, 1886, up to the — day of January or February, 1887, had assumed to act as manager, in the owner's right, over said property, and had received therefrom large sums of money, and the rents, issues, and profits from the same, which belonged to all the tenants in common, and fraudulently retained the same; that the said defendant had taken away the ores, metals, and minerals contained within that portion of said vein situated within the boundaries of said claim after passing beyond the said boundary line of said Amy claim on its onward strike, and had appropriated exclusively to itself all of the same.

The complaint prayed for a partition of said premises; for an accounting by the said defendant; for a judgment for the balance found due, and for a discovery.

The answer denied that the plaintiffs had any estate in said ledge situate within the vertical plane of the southern boundary of the Non-Consolidated lode claim and its other boundaries, now opened and developed by shafts

and underground workings, and which passes in its onward course and strike from and out of the Amy claim through the northern boundary line and vertical plane of said Amy into the said Non-Consolidated claim.

It alleged that the vein or lode claimed by plaintiff had its apex within the limits and boundaries of the Amy and is a part and parcel thereof, and is owned exclusively by the defendant. It denied that the defendant, as manager, or otherwise, had received any sum in which the plaintiff had an interest, or that it had retained any issues, rents, or profits belonging to said common property, or that it had taken away any quantity of minerals or appropriated the same, in which the plaintiff had any interest, or that it had refused to account.

A replication was filed denying the allegations of the answer.

The case was tried by the court without the intervention of a jury, and the court made the following finding of facts:

First. That the respective parties are the owners in fee of the claims set out in the complaint and answer.

Second. That the west end line of the "Amy" claim as located and patented is four hundred and ninety-one (491) feet in length and runs south three (3) degrees east.

Third. That the east end line of the same as located and patented is four hundred and ninety-one (491) feet in length and parallel with the said west end line.

Fourth. That the north side line of the said claim as located and patented is one thousand four hundred and seventy feet in length (1,470), and runs south sixty-six (66) degrees thirty (30) minutes west.

Fifth. That the south side line thereof as located and patented is one thousand four hundred and seventy (1,470) feet in length, and runs north sixty-six (66) degrees thirty (30) minutes east.

Sixth. That the vein of the said "Amy" mining claim, which is in controversy herein, and which is the discovery vein of the "Amy" claim, in its onward course and strike passes beyond the north side line of said claim as located, and that the apex thereof in its onward course and strike passes through the same at a point one hundred and eighty-four (184) feet from the west end line thereof into the "Non-Consolidated" mining claim, and that said vein in its onward course and strike extends and runs on indefinitely in a northwesterly direction, and does not return into the said "Amy" mining claim.

Seventh. That said vein and its apex passes out of the south side line of the said "Amy" mining claim as located at some point between the southeast corner of said claim and a point six hundred (600) feet westerly therefrom.

Eighth. That the dip of said vein throughout is to the north.

Ninth. That four hundred and eleven (411) feet of the north line of the "Amy" mining claim, commencing at a point seventeen (17) feet east of its northwest corner, forms the south line of the Non-Consolidated mining claim as patented.

Tenth. That the west end line of the "Non-Consolidated" mining claim is one hundred and eighty-one (181) feet in length, and runs south one (1) degree forty (40) minutes west.

Eleventh. That the north side line of the said "Non-Consolidated" mining claim is three hundred and seventy-two (372) feet in length, and runs north eighty-eight (88) degrees fifty-five (55) minutes west.

Twelfth. That the east end line of the said "Non-Consolidated" mining claim is ten (10) feet in length, and parallel to the said west end line thereof as patented.

Thirteenth. That the decision of the court (subject to

the right of review on appeal) as to whether a vertical plane drawn downward along the boundary line of the said "Amy" and the said "Non-Consolidated" mining claims or a vertical plane drawn downward on a line parallel with the west end line of the said "Amy" mining claim (where the apex thereof passes through said side line) or otherwise shall define the rights of the parties, and shall likewise determine the right to an accounting or the extent thereof, as the case may be.

Fourteenth. That both of said mining claims were located and entry made since the passage of the amendments of the mineral-land law in 1872 and subject thereto, and that the said "Amy" mining claim is the older location, and held under the senior patent.

Fifteenth. That the said plaintiffs are the owners of three-fourths of the said "Non-Consolidated" mining claim, and the defendant is the owner of one-fourth of the same; that the same cannot be divided without great prejudice to the parties in interest; that there are no liens or encumbrances on the same, or other persons interested therein, and that the evidence shows that in all respects a partition by sale of said premises should be had

(Signed) S. DE WOLFE, *Judge*.

The court held that "lines drawn through the vein at "right angles with its strike or course where the vein de- "parts from the surface side lines of the claim (the Amy) "and these lines extended laterally in the direction of the "dip or pitch of the vein beneath the surface and vertical "lines drawn downwards through these lines and inter- "secting the vein beneath the surface defines, in my view, "the dip of the vein and the portion thereof to which the "defendant in the present case is entitled" (Record, p. 10). The plat on page 16 of the Record will show the line fixed by the court.

This decision was against the plaintiff, and he appealed to the supreme court of the Territory.

The case came on for hearing before the supreme court of Montana, the Territory having become a State before the hearing.

That court held that "the plane bounding the portions "of the dip of the Amy vein lying north of and outside of "the Amy north side line shall be drawn from the point "where the apex crosses that north side line, and in a "direction north 3 degrees west," and modified the judgment of the district court accordingly, and directed the district court to enter judgment in accordance with the aforesaid judgment of the supreme court.

The plaintiff appealed to this court and sued out a writ of error, and made the following

ASSIGNMENT OF ERRORS:

1. The said supreme court of Montana erred in not awarding to the plaintiff in error the premises and mineral in controversy in said cause.

2. The said court erred in awarding the premises and mineral in controversy to the said Amy Consolidated Mining Company.

ARGUMENT.

From the finding of facts in this case it appears that the Non-Consolidated and Amy are adjoining mineral claims, having a common boundary for the entire south line of the Non-Consolidated and a portion of the north line of the Amy.

The vein in controversy has its apex in the Amy and extends to and crosses the north line of the Amy (and south line of the Non-Consolidated) at a point 17 feet from the west line of the Non-Consolidated.

It runs diagonally across the Amy and in a northwestern direction, until it reaches the west line of the Non-Consolidated. It extends to the south line of the Amy, and crosses that line at a point between the southeast corner of said Amy and a point 600 feet westerly therefrom (7th Finding, Record, p. 7).

The portion in controversy, which is claimed by both parties, lies north of the south line of the Non-Consolidated. The court below gave it to the defendant—the Amy.

We maintain that the court erred, and that it should have been awarded to the Non-Consolidated claim. The case involves the construction of section 2322 of the Revised Statutes; that section is as follows:

"SEC. 2322. The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations, not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their location, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the

" locator or possessor of a vein or lode which extends in " its downward course beyond the vertical lines of his " claim, to enter upon the surface of a claim owned or " possessed by another."

The court below regarded the question made as new and one that obliged it to "plough a furrow in virgin soil." We do not concur in that view. The facts of the case are not precisely like those which have passed into judgment, but the principle that controls the case is very familiar to this Court. That principle is that, *in a location which crosses a lode, instead of being upon and along its course, the side lines become the end lines.*

This doctrine was first announced in the Flagstaff case, *Mining Company* v. *Tarbet* (98 U. S. 463).

In that case the Titus location had been made very nearly along the course of the vein for 600 feet westwardly, and 200 feet in width. The Flagstaff had a patent for a mining location 100 feet in width and 2,600 feet in length, running in a northerly and southerly direction. This location crossed the Titus near its west end, and nearly at right angles. The Flagstaff worked subterraneously to a point some 300 feet to the east of its location, and on the north side of the Titus and within about 100 feet of the Titus location. It was for the mineral taken out in this working that the suit was brought, and the question was, which of the parties was entitled to it?

Mr. Justice Bradley delivered the opinion of the Court. He said:

" It is conceded that both parties are working on the " same lode or vein of ore. The Flagstaff discovery, to " which the location of the plaintiff in error relates as its " starting point, is situated nearly due west from that of " the South Star and Titus, and about five hundred

" feet therefrom. The lode crops out at the two points " of discovery, but is not visible at intermediate points. " These croppings, however, show that the direction or " course of the apex of the vein, at or near the surface, is " nearly east and west. The location of the Titus, claimed " by the defendant in error, nearly corresponds with this " surface course of the vein. The location of the Flagstaff, " belonging to the plaintiff in error, crosses it nearly at " right angles.

" The principal difficulty in the case arises from the " fact that the surface is not level, but rises up to a moun- " tain in going from Titus discovery to the Flagstaff. " The dip of the vein being northeasterly, it happens that, " by following a level beneath the surface, the strike of " the vein runs in a northwesterly direction, or about " north 50° west. In other words, if by a process of " abrasion the mountain could be ground down to a plain, " the strike of the vein would be northwest instead of " west, as it now is on the surface; or, at least, as the " evidence tended to show that it is. In that case the " location of the defendant in error would leave the vein " to its right, and the location of the plaintiff in error " would not reach it until several hundred feet to the " north of the Flagstaff discovery.

* * * * * * *

" These instructions and refusals to instruct indicate " the general position taken by the court below, namely, " that a mining claim secures only so much of a lode or " vein as it discovers along the course of the apex of the " vein, on or near the surface, no matter how far the lo- " cation may extend in another direction. * * *

" We think that the intent of both statutes is that min- " ing locations on lodes or veins shall be made thereon " lengthwise, in the general direction of such veins or " lodes, on the surface of the earth where they are dis- " coverable; and that the end lines are to cross the lode " and extend perpendicularly downwards, and to be con- " tinued in their own direction either way horizontally; " and that the right to follow the dip outside of the side " lines is based on the hypothesis that the direction of

"these lines corresponds substantially with the course of "the lode or vein at its apex on or near the surface. It "was not the intent of the law to allow a person to make "his location crosswise of a vein, so that the side lines "shall cross it, and thereby give him the right to follow "the strike of the vein outside of his side lines. That "would subvert the whole system sought to be established "by the law. If he does locate his claim in that way, "his rights must be subordinated to the rights of those "who have properly located on the lode. Their right to "follow the dip outside of their side lines cannot be in-"terfered with by him. His right to the lode only ex-"tends to so much of the lode as his claim covers. If he "has located crosswise of the lode, and his claim is only "one hundred feet wide, that one hundred feet is all he "has a right to. This we consider to be the law as to lo-"cations on lodes or veins.

"The location of the plaintiff in error is thus laid across "the Titus lode—that is to say, across the course of its "apex at or near the surface; and the side lines of the "location are really the end lines of his claim, consider-"ing the direction or course of the lode at the surface.

"As the law stands, we think that the right to follow "the dip of the vein is bounded by the end lines of the "claim, properly so called; which lines are those which "are crosswise of the general course of the vein on the "surface."

* * * * * * *

"The plaintiff in error contended, and requested the "court to charge, in effect, that having received a patent "for two thousand six hundred feet in length and one "hundred feet in breadth, commencing at the Flagstaff "discovery, on the lode at the surface, it was entitled to "two thousand six hundred feet of that lode along its "length, although it diverged from the location of the "claim and went off in another direction. We cannot "think that this is the intent of the law. It would lead "to inextricable confusion. Other locations correctly "laid upon the lode, and coming up to that of the plain-"tiff in error on either side, would, by such a rule, be

" subverted and swept away. Slight deviations of the " out-cropping lode from the location of the claim would " probably not affect the right of the locator to appropri- " ate the continuous vein ; but if it should make a material " departure from his location, and run off in a different " direction, and not return to it, it certainly could not be " said that the location was on that lode or vein farther " than it continued substantially to correspond with it. " Of what use would a location be, for any purpose of " defining the rights of parties, if it could be thus made " to cover a lode or vein which runs entirely away from " it. Though it should happen that the locator, by sink- " ing shafts to a considerable depth, might strike the same " vein on its subterranean descent, he ought not to in- " terfere with those who, having properly located along " the vein, are pursuing their right to follow the dip in a " regular way. So far as he can work upon it, and not " interfere with their right, he might probably do so ; but " no farther. And this consequence would follow irre- " spective of the priority of the locations. It would de- " pend on the question as to what part of the vein the " respective locations properly cover and appropriate."

* * * * * *

" If these views are correct, the Titus claims, belonging " to the defendant in error, were located along the vein or " lode in question in a proper manner ; and the Flagstaff " claims, belonging to the plaintiff in error, were located " across it, and can only give the latter a right to so much " of the vein or lode as is included between their side " lines. The court below took substantially this view of " the subject, and ruled accordingly."

This case is affirmed by the case of *Iron Silver Mining Company* v. *Elgin Mining Company* (118 U. S. 196). It is there held that the surveyed lines are the only ones that can be considered and that the end lines must be parallel, otherwise there is no right in the locator to follow the vein outside of vertical planes drawn through the side lines.

The question came before this Court again in the case of the *Argentine Mining Company* v. *The Terrible Mining Company* (122 U. S. 478). The Terrible Company was the owner of the Adelaide mining claim, which was located so that it extended longitudinally in a northeast and northwest direction. The Argentine Company was the owner of three mining claims, called the Camp Bird, the Pine, and the Charlestown lode claims. These claims were located east and west and crossed the Adelaide claim diagonally.

The Terrible Company carried its workings through its own grounds and into and under the Adelaide, and for the mineral carried away in these workings the Terrible Company brought suit. It recovered in the court below and the Argentine sought to reverse the judgment in this Court on the ground that it had followed the vein outside of its surface side lines, but within the vertical planes made by its end lines.

Mr. Justice Field delivered the opinion of the Court. He said:

"The instruction asked assumes that the longest sides "of its claims were their side lines. Such would un- "doubtedly be the case if the location of the claims "were along the course or strike of the lode. The statute "undoubtedly contemplates that the location of a lode or "vein shall be along the course of the lode or vein. * * *

"When, therefore, a mining claim crosses the course of "the lode or vein instead of being 'along the vein or lode,' "the end lines are those which measure the width of the "claim as it crosses the lode. Such is evidently the "meaning of the statute. The side lines are those which "measure the extent of the claim on each side of the "middle of the vein at the surface. Such is the purport "of the decision in *Mining Co.* v. *Tarbet* (98 U. S. 463). "* * * Such being the law, the lines which separate "the location of the plaintiff below from the locations of

"the defendant are end lines, across which, as they are "extended downward vertically, the defendant cannot "follow a vein, even if its apex or outcropping is within "its surface boundaries, and, as a consequence, could not "touch the premises in dispute, which are conceded to "be outside of those lines and outside of vertical planes "drawn downward through them."

There can be no mistaking the purport and effect of this decision. It was upon a case identical in principle with the one before the Court.

The court below, in the exercise of its arbitrary power, created a boundary line. It adjudged that a line drawn through the north line of the Amy at the point where the lode crossed that line and parallel with the west end line of the Amy was the line that defined the rights of the plaintiff. We fail to find any authority for it in the statute.

It is far better to follow the rule laid down by this Court, that the side lines become the end lines, than that the question of making a line should be left to the opinion of the different judges who may be called upon to decide. This case illustrates the fact that they will not agree. The district judge adopted one line and the Supreme Court another.

The court below drew a line at right angles with the local strike at the point where it crosses the north side line of the Amy. It is not shown exactly where the vein would pass the south line of the Amy. It is found that it would be somewhere between the southeast corner and 600 feet therefrom. What the strike is at that point is not shown; but inasmuch as the strike is frequently very irregular it is not at all improbable, but on the contrary is highly probable, that the strike at that point is very different from that at the north line, and that a line drawn

at that point, in the manner the one on the north was directed by the court below to be drawn, would not be parallel with the former, and would therefore conflict with the Elgin case, which holds that the end lines must be parallel, otherwise the locator has no right to follow the vein outside of vertical planes drawn through the side lines.

We attach hereto, as an appendix to our argument, the plat and views of an eminent mining engineer showing the difficulties that would attend the practical application of the rule adopted by the court below.

WALTER H. SMITH,
C. W. HOLCOMB,
Attorneys for Plaintiff.

NOVEMBER 18, 1893.

Now comes a ruling from the supreme court of Montana, in which they decide that where a location has been incorrectly made, and the vein runs across the claim, instead of lengthwise on it, that the claim shall be shortened so as to include only that part of the location diagonally traversed by the vein, *i. e.*, that a new end line parallel to the old shall be drawn at a point where the vein enters the side line, and another similar and parallel one where the vein, after traversing the claim, leaves the opposite side line.

In the case in question this decision does not present any remarkable or noteworthy features, but the impossibility of the application of this principle to cases which could and certainly would arise can be plainly illustrated by the accompanying diagram. In the sketch *x y* represents the outcrop of a vein pitching in the direction of the shaded lines. Upon it, among others, are located the three claims A. B. C. D., E. F. G. H., I. J. K. L., priority of location in the order above given.

It will be seen that the vein enters one side line of the claim A. B. C. D., and passes out of the other after describing a reverse bend upon the central portion of which a locator, judging from its course at that point, would naturally place the location in the position shown. The vein pitches toward the observer, and in its downward course into the earth passes out of the side line of E. F. G. H. at T. U., out of the end line of A. B. C. D. below R. S., and out of the claim I. J. K. L. at V. W. Now, according to the decision of the supreme court in the Flagstaff case, the side lines of the claim A. B. C. D. would become the end lines having extralateral rights beyond R. S., in which case permission to follow the vein beyond the new side line C. D. would carry out the intent of the

law very closely, for it is plainly evident that the framers of the act never contemplated the difficulty of ascertaining the true dip of a vein before development began, and assumed that the side lines of a claim would always be parallel to the strike of the vein. Where a location has been laid crosswise instead of lengthwise upon a vein outcrop so that, as in the diagram, the vein enters the side line B. C. and passes out through the opposite side line A. D., it is clear that the end lines A. B. C. D. approximate more nearly to the true strike of the vein than lines which intersect it, and that the intent of the law will be more fully carried out by calling the lines which *cross the vein the end lines*, which in *truth they are, as they bound the ends of the locator's vein*, which is the thing he is supposed to be after, and not the parallelogram of surface ground which accompanies it.

If the case illustrated by the diagram were to be governed by the decision of the supreme court of Montana in the Amy and Silversmith case, new end lines N. M. and O. P. would have to be erected at the points where the vein leaves the side lines, and extralateral rights taken in the direction of those new end lines extended, which in the case illustrated would include the darkly shaded portion of the vein extending from the apex down to P. (Q.), thus completely cutting away the outcrop and upper portion of the vein in the claim E. F. G. H., upon which the owner had a perfectly valid location, and a perfect title.

It is safe to say that no court or jury in the land would ever grant such a privilege to the claim A. B. C. D., and it would be easy to draw numerous diagrams, and find hundreds of actual locations upon the ground where the application of the law laid down by the supreme court of Montana in the Amy and Silversmith case would be equally impossible as the above.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

Term No. 169—Record, Case No. 14,131.

SILAS F. KING, APPELLANT AND PLAINTIFF IN ERROR,

vs.

THE AMY & SILVERSMITH CONSOLIDATED MINING COMPANY.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

BRIEF FOR APPELLEE AND DEFENDANT IN ERROR.

W. W. DIXON,
For Appellee and Defendant in Error.

The Standard Publishing Co., Anaconda, Montana

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I.

STATEMENT OF CASE.

The findings of fact by the court of original jurisdiction were all agreed upon by the parties except

the seventh (record p. 7), and that was found by the court with sufficient accuracy for the purposes of the question here involved.

The Plaintiff owns an undivided three-fourths and the Defendant an undivided one-fourth of the Non-Consolidated Lode Mining Claim, as tenants in common. The Defendant owns all of the Amy Lode Mining Claim. Both claims are in Silver Bow County, Montana. Both were located and patented under the United States Mineral Land Act of May 10, 1872.

The Amy claim is the elder location and held under the senior patent. The relative position of the two claims is shown on the diagram in the record marked "Fig. 1," opposite page 16 of the record, and on the same diagram are shown the course of the vein in controversy, the boundaries of the two claims and courses and distances. Four hundred and eleven feet of the North side line of the Amy, commencing at a point 17 feet East of the Northwest corner and and running Westerly, forms the South side line of the Non-Consolidated.

The end lines of the Amy are parallel and of equal length, 491 feet. The side lines are also parallel and 1,470 feet each in length. The location is therefore a parallelogram, 1,470 feet long Easterly and Westerly and 491 feet wide Northerly and Southerly.

The vein of the Amy on its course or strike passes through the North side line into the Non-

Consolidated, and the apex of the vein crosses said line 184 feet Easterly from the West end line and does not again enter the Amy claim. The apex of the vein crosses the South side line of the Amy at some point within 600 feet Westerly from the South-east corner of the Amy. This point is marked on the diagram referred to as at the extreme Westerly or 600 foot point. The dip of the vein is to the North.

Plaintiff's action is for a partition of the Non-Consolidated claim and for an accounting by Defendant of certain ores alleged to have been taken by it from underground workings at a point North of the Amy North side line and underneath the surface of the Non-Consolidated and East of what is designated on the diagram as Respondent's (or Defendant's) line. Defendant admitted the co-tenancy in the Non-Consolidated, but denied taking any ore from that claim, and averred that the ore was taken from part of the Amy claim.

The controversy was as to whether the Amy owner had any right at all (except as co-tenant with Plaintiff in the Non-Consolidated) to the ore on the dip of the Amy vein North of a vertical plane drawn downward through the North side line of the Amy, or, if it had any right, where the line of the plane that bounded this right was to be fixed.

Plaintiff contended and now contends that on account of the Amy location not being altogether along the course of the vein, it has no extra-lateral

rights beyond its surface lines, or rather beyond vertical planes drawn downward through such surface lines — whether end or side lines.

Defendant contended and now contends that the vertical plane limiting its right should be drawn downward at or through the point where the Amy apex crosses the North side line of the Amy and parallel to the planes of the end lines of the Amy location, and that East of this plain, although North of its North side line, it had a right to the ore on the dip of its vein.

The District Court did not adopt the views of either Plaintiff or Defendant, but held that while the bounding plane limiting Defendant's rights should be fixed at the point where the apex of the vein crosses the North side line of the Amy, such plane should be drawn downward perpendicularly at right angles to the strike or course of the vein at that point. The court accordingly made a decree for partition of the Non-Consolidated and found the rights of the parties in the two claims according to his decision, and ordered an accounting accordingly. The accounting was, however, suspended until the main question could be decided on appeal.

The diagram shows the lines of the planes as claimed by Respondent and as decided by the Court. They are marked respectively "Respondent's Line" and "Court's Line." The difference to the Defendant between its line and the Court's line was not very

great, as little ore had been taken out between the two lines.

Plaintiff appealed to the Supreme Court of Montana. Each party argued its theory, and the District Judge, who had then retired from the bench and resumed practice, also argued on the part of Respondent in support of his decision below. The State Supreme Court sustained Respondent's contention and reversed the decision of the Court below, and from the Supreme Court the case comes here for final determination.

These matters are stated somewhat at length in hopes that the Court may more readily get at facts which are rather scattered in the record.

II.

BRIEF OF ARGUMENT.

Only a single question is involved in this appeal, but that question is of the greatest practical importance in all the mining States and Territories and will affect many and valuable interests by its decision.

The question has never yet been, I think I may say, squarely presented to or decided by this Court. Two or three cases where the question incidentally arose or was referred to have been before the Court, and in the opinions in these the Court has sometimes used expressions which, it seems to me, have been misconstrued into decisions. But of these hereafter.

The question is now directly and fairly brought before the Court by this case, and I hope by its decision it will be definitely settled.

2.

The question briefly stated is: What are the rights of adjoining claimants of lode mining claims under the Act of Congress of May 10, 1872, in cases where the vein or lode in its strike or course crosses the side line or lines instead of the end line or lines of the claim. Or, to put it in another way, what, if any, extra-lateral rights on the dip of the vein has the owner of a claim where his location is not made along the course of the vein, but so made that the vein in its course does not pass through the end lines of the location, but departs through the side lines?

The answer depends, of course, upon the construction of Section 2322 U. S. Revised Statutes: "The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all the surfaces included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be

confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

As is said by the Court in Iron S. M. Co. vs. Elgin M. Co., 118 U. S. 206 (commonly called the Horse Shoe case). "This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it." * * * "The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right-angle to the course of the vein."

The Act of 1872 contemplates that generally all veins have a straight and uniform course or strike and a uniform and regular dip or downward course—that the location is made on and along such vein and that the vein passes out through the middle of each end line.

Of course, in such cases, the meaning and application of Section 2,322 is plain and easy.

But, as a matter of fact, every one at all familiar with practical prospecting and the location of mining claims knows that there are few such cases. The discoverer finds his vein and marks his boundaries and records notice of his claim. Under the Montana statute he has only twenty days after the discovery

or location to make his record. To ascertain with any exactness the course of the vein discovered throughout a distance of say 1,500 feet in length, is practically impossible within any short period of time or with the expenditure of any reasonable amount of money.

The ascertainment of the course of a vein for 1,500 feet frequently requires long time and great expenditure, and very often is not made until years after the claim has been patented and extensively worked.

Particularly is this true where, as often happens, the general course of the veins in the neighborhood is irregular and variant.

I do not believe that in one-half the 1,500-foot locations that are made the vein discovered runs out through both end lines of the location.

It must be presumed that the actual condition of affairs was known to Congress when it enacted the law of 1872, and that while it could not provide for every case arising under the law it did not intend to prescribe rules that were impracticable or would work gross injustice.

3

There are a few points to which I wish to call the attention of the Court before proceeding further. They are clearly to be deduced from the provisions of the mining act or settled by judicial construction; but

I think want of proper attention to them has sometimes led to confusion.

First. The lines or boundaries required to be fixed by the locator are surface lines and lines of location, not of the vein.

Second. The right to go beyond vertical planes drawn downward through the surface lines is only given by Section 2322 AS TO THE SIDE LINES and on the DOWNWARD COURSE (or DIP, as the miners call it) of the vein. The vein cannot be followed on its STRIKE or COURSE over the side lines of a location any more than over the end lines. As to the strike, the side lines and end lines both limit the right to it, and one just as effectually as the other. The right on the strike is confined to vertical plans drawn through all the lines of the location, whether end or side lines. In its downward course the right to the vein is limited by the end lines, as well as the course. The end lines fix vertical planes beyond which the locator cannot go for any purpose. But he may go beyond the side lines on the downward course only, if he has the apex of the vein and keeps within planes drawn vertically downward through the end lines extended in their own direction.

Third. The end lines marked as such in the location must control. They cannot be changed. The locator has made them end lines, and however variant they may be from what they should be he must abide the consequences and suffer the disadvan-

tages. The opinion in the Horse Shoe case seems conclusive upon this point.

If these points are correct it seems improper and misleading to say that the side lines ever become the end lines of a claim. The side lines may have the same effect as the end lines in cutting off the right to follow the dip in certain cases; but they still remain side lines.

Fourth. Under Section 2,322 the extra-lateral right is given as to ALL veins the top or apex of which lies inside of the surface lines extended downward vertically. No distinction is made between the discovery vein and other veins. It can hardly be supposed that Congress presumed that all veins within the location would have a uniform course or all run out through the end lines. On the contrary, it is to be supposed that the Act contemplated that these different veins might vary widely in their courses or directions. The argument is, therefore, that the extra-lateral right on any vein is not dependent upon its course with reference to the end lines.

Fifth. It would seem, under Section 2,322, that the law intended to give the locator an extra-lateral right on the vein equal in extent and corresponding to the length of the apex within his location; and this, I think, is the doctrine of the Horse Shoe case.

4

Three theories are advanced in this case of the

question under consideration, and I do not think any others can be even plausibly suggested by any one. The first is that of the District Court and may be stated thus:

Where the vein on its course passes out of one or both side lines of a location and does not pass through one or both end lines, the extra-lateral right on the vein is bounded on the one side by the vertical plane of the end line extended in its own direction and on the other by a plane drawn vertically downward along a line drawn through the point where the apex of the vein crosses the side line and at right angles to the course of the vein at that point.

I shall not dwell long upon this theory. It has nothing in the line of convenience or certainty to recommend it. It does not seem to derive any support from Section 2,322. I refer to the opinion of the Supreme Court of Montana for the arguments against it.

It is not sustained by any authority. On the contrary, the Horse Shoe case is directly against it. It is substantially the same position taken in the dissenting opinion in that case. The only difference is that in the dissenting opinion the line was drawn at right angles to the general course of the vein, whereas in the District Court's opinion, the line is drawn at right angles to the course at the point where the vein crosses the side line.

5.

The second theory is that of the plaintiff. It is, as I understand it, that where the vein on its course passes out of one or both side lines of the location and does not pass through one or both end lines the vein has no extra-lateral rights whatever and the right to follow it, on the dip as well as on the course, is limited on all sides on the side lines as well as on the end lines by planes drawn vertically downward through all the lines of the location.

It does not require an extended argument to show with what hardship and injustice this doctrine would operate in practice. The slightest divergence of the vein from one or both end lines of the location would cut off all extra-lateral rights, which are often the most valuable of the location. If the location was laid, although with the utmost good faith and after the most thorough investigation, so that the end line missed the vein a foot, the locator would be confined by vertical planes on all sides.

Such exactness is not required by the law, nor is it in accordance with its spirit. So, too, under this doctrine, a locator might have 1,499 feet of the apex of a vein with no extra-lateral right whatever. The contention of the plaintiff, however, does not seem to be urged upon the ground of equity, or even of convenience, but is rested upon certain opinions of this Court which it is claimed are to be taken as determining the question. To these opinions I desire briefly

to call attention. The cases referred to are only three in number:

First, Mining Co. vs. Tarbet, 98 U. S., 463, usually referred to as the Flagstaff case;
Second, Iron S. M. Co. vs. Elgin M. Co., 118 U. S. 196, generally called the Horse Shoe case; and
Third, Argentine Co. vs. Terrible Co., 122 U. S. 478.

6.

The Flagstaff case:

In this case it was attempted to invoke the doctrine that had prevailed before the enactment of a mining law by Congress. Theretofore it had been held that one having a location upon a claim could follow the strike of the vein in whatever direction it might run. The location was the vein and nothing else, and if the locator was mistaken in its course he might, nevertheless, follow the vein for the full number of feet which he was entitled to and did locate. Under a location made under the law of 1866 it was contended that this still might be done, and if the vein in its onward course departed through the side lines, the locator of the claim might follow it on its course to the full extent of the vein which he had located or attempted to locate. This the Supreme Court say he may not do; that the ground located fixes the extent of his right to the vein; whatever extent of vein might be included therein, he had a right to, but he could not go beyond his side lines in fol-

lowing the vein on its strike. To the extent that this decision goes in the determination of the question in controversy, it corresponds exactly to the position taken and maintained by the defendant.

The Flagstaff case was undoubtedly correctly decided. It held that the side line cut off the right to follow the vein on its course in any case. The question of dip did not really arise. The company was working on the dip of a vein long after the corresponding apex had passed out of its boundaries, and the Court held it had no right so to do.

I think some of the expressions in the Horse Shoe case have caused misunderstanding and confusion.

To say that a side line ever becomes an end line seems to me incorrect. A side line has the same effect as an end line in all cases in cutting off the right to follow the vein on its course; but that does not make it an end line. As to some other vein within the location, it may serve as a side line and be crossed on the dip. The side and end lines are those marked as such by the locator on the surface, and by those he must abide.

The Horse Shoe case:

I think the decision in this case turned altogether upon the form of the claim, and that the question arising in the case at bar was not considered and did not arise. The Court held that on account of the

peculiar form of the claim no end lines had ever been established, and if the so-called end lines were extended in their own course they would not include the ground in controversy in that action. In the course of the opinion the Court says: "We are therefore of opinion that the objection, THAT BY REASON OF THE SURFACE FORM OF THE STONE CLAIM, THE DEFENDANT COULD NOT FOLLOW THE LODE EXISTING THEREIN IN ITS DOWNWARD COURSE BEYOND THE LINES OF THE CLAIM, was well taken to the offered proof. Besides, if the lines marked as end lines on the plat of the claim can be regarded as such lines of the location, no part of the Gilt Edge claim falls within vertical planes drawn down through those lines continued in their own direction."

This last point was undoubtedly conclusive of the case and sufficient to dispose of it.

In the case at bar no objection can be made to the form or shape of the location of the Amy, nor is there any doubt as to which lines are the end lines of the claim.

That the decision in the Flagstaff case was not considered as conclusive of or even applying to the Horse Shoe case, is shown by the fact that Mr. Justice Bradley, who delivered the opinion in the Flagstaff case, concurred with Chief Justice Waite in his dissenting opinion in the Horse Shoe case.

The opinion in the Horse Shoe, as I take it, establishes these propositions: 1st, That the bound-

ary planes are definitely determined by the lines of the surface location and are not subject to change or readjustment; 2nd. That the end lines must be parallel; 3d. That there may be a claim of such surface form (as the Stone claim was) that it has no proper end lines and no extra-lateral rights.

I find no where in the opinion any assertion or intimation that where the surface location is in proper form all extra-lateral rights are lost because the location is not laid exactly along the vein, or because the vein may depart from the claim through one or both side lines. On the contrary the Court say: "IF THE FIRST LOCATOR WILL NOT OR CANNOT MAKE THE EXPLORATIONS NECESSARY TO ASCERTAIN THE TRUE COURSE OF THE VEIN AND DRAWS HIS END LINES IGNORANTLY, HE MUST BEAR THE CONSEQUENCES. HE CAN ONLY ASSERT A LATERAL RIGHT AS TO SO MUCH OF HIS VEIN AS LIES BETWEEN PLANES DRAWN THROUGH THOSE LINES." It is not said that he loses ALL EXTRA-LATERAL RIGHTS; but only that such rights are limited by his end lines as drawn on the surface of the claim.

This is the doctrine we contend for here:

If the location is not laid along the vein, the locator is the loser. He gets less of the apex of the vein in length; and therefore, of course, a smaller section on the dip. But to contend that in such case he is punished by depriving him of all extra-lateral rights, not only on the vein located but on all other veins of which he has the apex, is not sound.

I believe the decision in the Horse Shoe case favors the theory the defendant contends for here.

8

The case of Argentine Co. vs. Terrible Co., 122 U. S. 478.

For a better understanding of the facts of this case and to show really what was in controversy, I call the attention of the Court to the decision of Justice Hallett, from the lower court, from which the writ of error was sued out. It is reported as Van Zandt vs. The Argentine Mining Company, 8 Fed. Rep., 725. It appears from the reading of the two decisions that the apex of the lode in controversy ran practically at right angles with the side lines of the Camp Bird and Pine locations, under which the defendants claimed. Under these circumstances, if the end lines of the claims, which were nearly parallel with the course of the vein, had been projected at the points of intersection, as I insist must be done in such cases, there would have been but little if any ground lying between them in which the dip of the vein could have been followed. But the defendants in that case insisted that they might follow the vein in its dip or downward course, not BETWEEN these lines but ACROSS them. The decision of the Court seems to be that the side lines became end lines for the purpose of cutting off the strike of the vein, and that the defendant could not follow across those lines for the reason that the ground in controversy was not between the end lines extended in their own direction,

and projected at the points of intersection of the side lines with the course of the vein. The further facts of the case, as appears from the reports, are that the Adelaide location, under which the plaintiffs claimed, was the older location of the two, or three claims; that it was made upon the dip of the lode upon which the Camp Bird and Pine claims were located; that the ground in controversy was within the limits of the Adelaide location, and that it belonged to the Adelaide by reason of its prior location, and that the defendants were attempting to take ores from the vein of the Adelaide location across its side line. An examination of the case as reported in the lower court will show that the question decided by this Court on appeal was really not raised or considered below, and the brief of counsel in this Court shows the same thing. The main question below was whether a location on the apex of the vein was superior to a prior location on the dip.

In this case, as in all others decided by this Court, the question has turned upon the particular facts of the case, and nowhere has the question arisen, in a case similar to the one now before the Court, and I contend that none of the cases cited apply to the facts of a case like those of the case at bar.

9.

Aside from all decisions the reason and purpose of the law seems clear. The intention is to give every locator all the veins, the top or apex of which are within his location. He may follow such veins in

their strike so long as he does not depart from his surface ground, but no further, whether the strike be determined by the side or end, or other line of the claim. He may follow all such veins in their dip or downward course wherever they may extend, with the one condition that they must not depart from within planes drawn downward through his end lines, or if the vein passes through the side lines, then between planes drawn downward at the point of departure, parallel to the end lines. The requirements of the law that these end lines should be made parallel show what its purpose was. Unless it was the intention to establish a plane along which the dip of the lode must be followed, there was no necessity for making the end lines parallel. By following parallel end lines there can be no divergence or contraction of the lines within which the dip is to be followed. The establishment of the end line is the establishment of a plane, and its parallelism has no other purpose than to establish a plane or system of planes along which the dip of all lodes within the claim must be followed.

The fact that all of the decisions cited quote so freely from Mining Company vs. Tarbet, and the effect of that decision is indisputable, shows what was in the minds of the Judges in the decision of the other cases, and that is simply this, that the side line becomes the end line for the purpose of cutting off the strike, and for no other purpose, and that the right to follow the dip must always be determined by the parallel end lines.

10

The third and last theory is that of defendant. It is that where the location is not laid on the surface directly along the vein, but the vein departs through one or both side lines, the locator has a right to so much of the dip of the vein outside of his vertical side lines as lies between the end line and a line drawn vertically downward parallel to the end line through the point where the apex crosses the side line.

This rule is within the language and intent of Section 2322, as it seems to me. It gives to the locator that extra-lateral right which the section expressly says he shall have to all veins, lodes or ledges, the top or apex of which lies within his surface boundaries. It gives him, as nearly as practicable, a section of the dip equal to the length of apex he has. It has at all times regard to the end lines as established on the surface, and makes all other lines correspond to the end lines. It keeps the section of the dip which the locator can follow at all times and as to all veins, within the vertical planes of the end lines, which the law in all cases makes the boundaries of the locator's lateral right. It establishes the same rule as to all veins and makes all the boundary planes parallel. The decisions of this Court, as I think, do not conflict with, but, so far as they go, approve the rule.

11

The rule is uniform, certain and practicable. It applies to all veins. It is plain and clear. It does

not require the determination of complicated or disputed facts. There is but one fact to be ascertained, and that not usually a very difficult one—the point where the apex of the vein crosses the side line. When that is found, application of the rule is easy and the rights of the parties settled.

12

The construction defendant contends for is eminently just and equitable. It does not infringe upon the rights of any adjoining claimant. While it subjects the locator to the disadvantages of his own inaccurate or mistaken location, it does not deprive him of the benefits of the law to the extent of his location. The construction of plaintiff would seem to require proof that the vein ran through the end lines before any extra-lateral right could be exercised, and this in many cases would be impracticable or impossible.

13

I refer to the very able opinion of the Supreme Court of Montana in this case in support of the construction of the law contended for by defendant. I refer to the case of

Tyler Mining Co. vs. Sweeny et al.,
54 Fed. Rep., 284.

This case was decided in the U. S. Circuit Court of Appeals for the Ninth Circuit in January, 1893, and the opinion was delivered by U. S. District Judge Hawley. The decision of the Montana Supreme

Court in the case at bar is approved and followed. I attach great weight to this decision of Judge Hawley's, for he is a Judge of great knowledge and long experience in mining law.

I refer also to

Doe vs. Sanger, 83 Cal., 203.

The defendant respectfully submits that the judgment and decree of the Supreme Court of Montana in this case should be affirmed.

W. W. DIXON,
Counsel for Appellee and Defendant in Error.